Supreme Court, U.S.
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No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME II, PAGES 269 TO 455

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721 A.2d 786

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Ronald ROMPILLA, Appellant.

Submitted Aug. 5, 1997.
Decided Dec. 10, 1998.
Reargument Denied Jan. 19, 1999.

Billy H. Nolas, Philadelphia, for R. Rompilla, appellant.

Michael P. McIntyre, Allentown, Robert A. Graci, Harrisburg, for the Com., appellee.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN and SAYLOR, JJ.

OPINION

NIGRO, Justice.

In this capital case, Appellant Ronald Rompilla appeals from the Order of the Lehigh County Court of Common Pleas, which denied his petition for relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. For the reasons set forth below, we affirm.

On November 1, 1988, Appellant was convicted of murdering James Scanlon on January 14, 1988 in Scanlon's bar, the Cozy Corner Cafe, in Allentown, Pennsylvania. Scanlon's son discovered his father's body lying behind the bar in a pool of blood. Scanlon had been stabbed repeatedly and set on fire. His wallet had been stolen and about $500 to $1000 had been stolen from the

bar.[1] On November 3, 1988, after a penalty hearing, the jury found three aggravating factors outweighed one mitigating factor and sentenced Appellant to death.[2] This Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Rompilla,* 539 Pa. 499, 653 A.2d 626 (1995).

Following a stay of execution, on December 5, 1995, Appellant filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On March 28 and 29, 1996, the PCRA court held hearings on the petition. By Order dated August 21, 1996, the PCRA court denied Appellant's petition for relief. Appellant then appealed to this Court. He raises twelve claims.

Appellant first argues that his trial counsel was ineffective in the penalty phase for failing to investigate, develop and present evidence of mitigation related to his childhood upbringing, alcoholism, mental retardation, cognitive impairment and organic brain defects, which may have caused the jury to impose a life sentence. Appellant specifically maintains that counsel did not obtain records that would have aided the mental health experts who evaluated him, including school records reflecting a

[1] Appellant was convicted of murder in the first degree, 18 Pa.C.S. § 2502(a); burglary, *id.* § 3502(a); criminal trespass, *id.* § 3503(a)(1)(ii); robbery, *id.* § 3701(a)(1)(i); two counts of theft, *id.* § 3921(a); and two counts of receiving stolen property, *id.* § 3925(a).

[2] With respect to aggravating factors, the jury found that Appellant committed a killing in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6), that the offense was committed by means of torture, *id.* § 9711(d)(8), and that Appellant has a significant history of felony convictions involving the use or threat of violence, *id.* § 9711(d)(9). The jury found as a mitigating circumstance other evidence of mitigation under 42 Pa.C.S. § 9711(e)(8).

low IQ, a hospital record reflecting a fever at age two, and Department of Corrections records reflecting in part low achievement test scores and alcohol abuse. Appellant also argues that counsel failed to learn about Appellant's abusive childhood from his family.

To establish a claim of ineffective assistance of counsel under the PCRA, a defendant must show that (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for the act or omission in question; and (3) but for counsel's act or omission, the outcome of the proceedings would have been different. *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313, 323 (Pa.1997).[3] At the PCRA hearings, Appellant questioned former trial and appellate counsel about their representation and three of his siblings testified about his childhood. Appellant subsequently submitted depositions of a psychologist and neuropsychologist who evaluated him in 1995 and 1996 respectively. The parties also submitted depositions of the mental health experts who evaluated Appellant in 1988 and the deposition of a psychologist who reviewed Appellant's 1995 and 1996 evaluations.

After the hearings, the PCRA court concluded that Appellant's claim has arguable merit because Appellant was entitled to have relevant information of mental infirmity presented to the jury. However, the court found that counsel had a reasonable basis for proceeding as they did. It explained that trial counsel employed two recognized experts in the field of psychiatry and psychology who

[3] While the Court is currently considering the stringency of the prejudice requirement applicable to ineffective assistance claims under the PCRA in *Commonwealth v. Kimball,* No. 38 M.D. Appeal Dkt.1997, as shown below, this requirement is not implicated in this case.

administered tests, evaluated Appellant, and reported that there was nothing that could be used as mitigation evidence. Rather, the experts told counsel that Appellant was a sociopath. Counsel also obtained an evaluation by another psychiatrist who after evaluating Appellant, found nothing that would be beneficial in the penalty phase. Although counsel did not obtain the records identified above, the PCRA court found them not entirely helpful to Appellant and further found that counsel gave the experts whatever information they requested.

With respect to Appellant's siblings' testimony about his childhood, the PCRA court accepted trial counsel's testimony that when they questioned Appellant and his family before trial, they did not reveal the information that they now claim should have been told to the jury. The court rejected the siblings' testimony to the contrary. The court also stated that Appellant made contradictory statements to counsel during his representation and that counsel was reasonable in believing that their only avenue was to ask the jury to have mercy on him.

We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. In addition to concluding that counsel acted reasonably, we further find that Appellant's claim lacks arguable merit. As recognized by the PCRA court, trial counsel employed three experts to evaluate Appellant. N.T., 3/28/96 at 68-69, 120-21. Based upon their testing, the experts found nothing helpful to Appellant's case and diagnosed him as a sociopath. *Id.* at 122-23. The fact that Appellant now has found two experts who conclude that he has brain damage does not negate the fact that trial counsel investigated Appellant's cognitive abilities with other experts. In addition, we agree with the

PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances. *See* N.T., 3/29/96 at 27-28, 33, 38-39. Thus, Appellant's claim that trial counsel failed to investigate his mental health is without arguable merit.

With respect to the mitigation evidence brought forth by Appellant's siblings, the PCRA court accepted as credible trial counsels' testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-19, 133, 143; N.T., 3/29/96 at 111. Thus, Appellant's claim that trial counsel failed to investigate his family background also lacks arguable merit.

Related to this claim, Appellant next argues that because trial counsel failed to investigate his background, he received inadequate evaluations by mental health professionals in violation of his constitutional rights. Having found above that trial counsel did not fail to investigate, this claim similarly has no merit.

Appellant next argues that the prosecutor's penalty phase summation contained improper argument that violated his right to due process and a fair capital sentencing proceeding. We disagree. A prosecutor's comments do not constitute reversible error unless their unavoidable effect would be to prejudice the jury and form in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a true penalty determination. *Commonwealth v. Johnson,* 542 Pa. 384, 404, 668 A.2d 97, 107 (1995). At the

penalty phase, the prosecutor has more latitude in presenting argument since the presumption of innocence is no longer applicable. *Commonwealth v. Washington,* 549 Pa. 12, 700 A.2d 400, 414 (Pa.1997).

In his closing argument, the prosecutor said "[i]t's not easy for me to argue for the death penalty. . . . " N.T., 11/2/88 at 45. The prosecutor also ended his argument by stating "if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for. . . . " N.T., 11/2/88 at 53. Appellant maintains that in making these statements, the prosecutor personally vouched for the propriety of imposing the death penalty.

Appellant misconstrues the first statement. The prosecutor did not inject a personal opinion that the jury should impose the death penalty but rather stated that it is a difficult penalty to ask for. With respect to his second statement, the prosecutor argued with permissible oratorical flair that the jury should impose a death sentence. *See Commonwealth v. Jones,* 546 Pa. 161, 206, 683 A.2d 1181, 1203 (1996) (statement that "this is just the kind of case that the legislature had in mind [for the imposition of the death penalty]" found proper).

In addition, Appellant challenges the following statements by the prosecutor:

> [Defense counsel] gave you a very inspired, a very emotional speech and that is her job, there's nothing wrong with that. And what the main touchstone of that speech was mercy . . . [B]ut ask yourselves this, ladies and gentlemen of Jury. Did Ronald Rompilla show any mercy to Jimmy Scanlon, any mercy whatsoever? I submit

> to you, he did not. He did not show one bit of mercy on January 14, 1988.
>
> Did he show Jimmy Scanlon any mercy, any mercy whatsoever? I submit to you, he didn't.
>
> . . . I'm only asking you to show the same mercy to him that he showed to Jimmy Scanlon.

N.T., 11/2/88 at 47, 49, 50. This Court, however, has held that it is permissible during the penalty phase for a prosecutor to ask the jury to show the defendant the same mercy he showed the victim. *See Commonwealth v. Washington,* 549 Pa. 12, 700 A.2d 400, 415 (Pa.1997) (rejecting a similar challenge). Thus, no relief is warranted on this claim.

Appellant also argues that the prosecutor improperly stated that he killed the victim in order to eliminate any witnesses to his burglary of the bar. *See* N.T., 11/2/88 at 51-52. Appellant asserts that there is no evidence supporting this argument. The Commonwealth concedes that the argument was not strong given the facts of this case but maintains that it was fair as it related to the aggravating circumstance that the killing took place during the perpetration of a felony. We agree with the Commonwealth that whatever its purpose, the argument did not have the unavoidable effect of prejudicing the jury and forming in their minds fixed bias and hostility towards Appellant so as to prevent them from weighing the evidence and returning a true verdict.

Lastly with respect to prosecutorial misconduct, Appellant maintains that the prosecutor improperly commented upon the victim's family's inability to testify as to their feelings about the victim's death as compared to Appellant's family's ability to share their feelings with the

jury. *See* N.T., 11/2/88 at 52-53. The Court rejected a similar argument in *Commonwealth v. Jones,* 546 Pa. 161, 206, 683 A.2d 1181, 1203 (1996), where the prosecution stated that the jury did not have an opportunity to hear from the victim's family and friends, who would feel exactly the opposite of the defendant's family members. As in *Jones,* these comments served to respond to Appellant's family's testimony and the jury was able to infer the victim's family's feelings. While we do not condone the prosecutor's additional comments that the victim's son misses his father, we cannot conclude that the unavoidable effect of these comments was to arouse the jury's emotions or prejudice the jury so they could not fairly weigh the evidence.[4]

Next, Appellant claims that the trial court's instruction on the aggravating circumstance that the offense was committed by means of torture, 42 Pa.C.S. § 9711(d)(8), was unconstitutionally vague. The court's instruction was as follows:

> The second aggravat[ing] circumstance advanced by the Commonwealth was that the . . . offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily h[einous], atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not – the killer is not satisfied with the killing alone.

N.T., 11/2/88 at 55. This Court has previously found this instruction proper and has held that the aggravating circumstance that an offense was committed by means of torture is not unconstitutionally vague. In *Commonwealth v. Pursell,* 508 Pa. 212, 238-39, 495 A.2d 183, 196-97 (1985), the Court explained that this aggravating circumstance is sufficiently specific because the meaning of torture is a matter of common knowledge and an ordinary man would not have to guess what was intended. Thus, the jury will not impose the death penalty in an arbitrary manner. The trial court's instruction defining torture in this case is essentially the same as that given in *Pursell. See id.* at 239 n. 13, 495 A.2d at 197 n. 13.

Appellant appears to concede that the trial court gave an instruction defining torture that comports with *Pursell* and its progeny.[5] Nonetheless, Appellant argues that the definition employed by the court is unconstitutionally vague under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Maynard,* however, found vague an aggravating circumstance in the Oklahoma death penalty statute that provided that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at

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[4] This claim and most of Appellant's remaining claims were not raised on direct appeal. Appellant primarily argues the merits of each claim and notes that trial and appellate counsel were ineffective in handling the issues. The PCRA court ruled on the merits of Appellant's claims. We have also addressed the merits. Since we conclude that the claims do not have merit, it is unnecessary to address the other prongs of the test applicable to ineffective assistance of counsel claims, which is set forth on page three above.

[5] *See, e.g., Commonwealth v. Wharton,* 530 Pa. 127, 607 A.2d 710 (1992) (requiring instruction that defines the term torture); *Commonwealth v. Nelson,* 514 Pa. 262, 523 A.2d 728 (1987) (same).

363-64, 108 S.Ct. 1853. The Court explained that these words alone did not guide the jury as almost every murder could be characterized as especially heinous, atrocious, or cruel. *Id. Maynard* did not involve an aggravating circumstance that an offense was committed by means of torture. In addition, the Court in *Maynard* agreed that a limiting instruction that the aggravating circumstance at issue required torture would be constitutionally acceptable. *Id.* at 364-65, 108 S.Ct. 1853. Thus, *Maynard* does not preclude defining torture as the infliction of pain that is unnecessarily heinous, atrocious or cruel, with the intent to cause pain and suffering in addition to the intent to kill. Appellant's claim is without merit.

Appellant next argues that 42 Pa.C.S. § 9711(d)(9), which sets forth as an aggravating factor that the defendant has "a significant history of felony convictions involving the use or threat of violence to the person," is unconstitutionally vague. While acknowledging that the Court has consistently rejected this argument, *see, e.g., Commonwealth v. Rivers,* 537 Pa. 394, 644 A.2d 710 (1994); *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986), Appellant contends that the Court wrongly decided the issue.

Appellant maintains that in *Rivers* and *Fahy* the Court improperly relied upon *Commonwealth v. Beasley,* 504 Pa. 485, 475 A.2d 730 (1984), which held that the mitigating circumstance that a defendant has "no significant history of prior criminal convictions" is not vague. *Beasley* relied upon *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), where the defendant challenged a similar mitigating circumstance under the Florida death penalty statute. The United States Supreme Court found that the death penalty statute presented

questions that required no more line-drawing than is commonly required of a factfinder and held that the mitigating circumstance is not unconstitutionally vague. *Id.* at 257, 96 S.Ct. 2960.

In evaluating a vagueness challenge, the Court considers whether the death penalty statute adequately channels the sentencing jury's discretion so that the death penalty is not imposed on arbitrary or capricious grounds. *See Commonwealth v. Holcomb,* 508 Pa. 425, 463, 498 A.2d 833, 852-53 (1985). While *Beasley* involved a mitigating circumstance and thus did not present the identical issue that was before the Court in *Rivers* and *Fahy,* the Court looked to that decision because the statutory language challenged as vague was the same. A finding that a mitigating circumstance adequately channels the sentencing jury's discretion supports that an aggravating circumstance with the same language also passes constitutional muster. Thus, Appellant's claim is without merit.[6]

Appellant next argues that the trial court and counsel improperly discussed outside of his presence whether an instruction on voluntary manslaughter would be provided to the jury. He maintains that this discussion violated his right to be present during all critical phases of the trial. Appellant relies upon a discussion in the record that references an agreement made on an earlier date on

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[6] Appellant also argues that three other states have found similar aggravating circumstances unconstitutionally vague. *See State v. David,* 468 So.2d 1126 (La.1984); *Gall v. Commonwealth,* 607 S.W.2d 97 (Ky.1980); *Arnold v. State,* 236 Ga. 534, 224 S.E.2d 386 (1976). This Court distinguished these decisions in *Commonwealth v. Holcomb,* 508 Pa. 425, 463-64, 498 A.2d 833, 853 (1985), and we shall not revisit this issue.

whether the instruction would be given. *See* N.T., 10/31/88 at 92. Present counsel reviewed the record for the referenced date and found no discussion of the issue. Appellant thus claims a discussion was improperly held outside of his presence.

Defendants have a constitutional right to be present in court at every stage of a criminal trial. *Commonwealth v. Ford,* 539 Pa. 85, 100-01, 650 A.2d 433, 440 (1994). This right is based in part on the defendant's right to confront his witnesses under the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution. *See id.* In addition, the Pennsylvania Rules of Criminal Procedure provide:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict.

Pa. R.Crim. P. 1117(a).

The trial court explained that its discussions with counsel essentially involved housekeeping matters and that Appellant's presence would not contribute to the fairness of the trial. Appellant does not develop his constitutional argument in his brief to this Court. We conclude that the trial court's apparent discussion with counsel about the proceedings outside of Appellant's presence did not implicate his confrontation rights and his right to be present at all stages of the trial was not violated.

Appellant next argues that the trial court erred in answering the jury's question about accomplice liability. This Court ruled on this claim on direct appeal. *See Rompilla,* 539 Pa. at 508-09, 653 A.2d at 630-31. Appellant may not obtain relief under the PCRA on a claim that has already been litigated. 42 Pa.C.S. § 9543(a)(3). While Appellant contends in a footnote that appellate counsel did not adequately pursue this claim on direct appeal, post-conviction review of a claim already litigated on appeal cannot be obtained by alleging ineffective assistance of prior counsel and presenting new theories of relief. *Commonwealth v. Peterkin,* 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994).

Appellant next argues that the trial court improperly allowed the prosecutor to read to the jury the testimony of the victim of a prior rape during the penalty phase. Appellant was convicted of rape and burglary arising from a single incident in 1974. When Appellant objected to the introduction of the testimony, the prosecutor argued in part that it was necessary to establish that the related burglary conviction was violent for purposes of the aggravating circumstance that Appellant has a significant history of felony convictions involving the use or threat of violence, 42 Pa.C.S. § 9711(d)(9). *See* N.T., 11/1/88 at 33-38. The trial court admitted the testimony. *Id.*

On direct appeal, Appellant's former counsel argued that the trial court erred in admitting the rape victim's testimony because it appealed to the passions of the jury. The Commonwealth again maintained that it was necessary to establish the aggravating factor and that reading the transcript was the most efficient way to present the facts. This Court held that the trial court did not err in allowing the testimony to be read to the jury. *Rompilla,*

539 Pa. at 512-14, 653 A.2d at 633 (1995). Relying upon *Commonwealth v. Christy,* 511 Pa. 490, 515 A.2d 832 (1986), the Court stated that the Commonwealth had to show a threat or use of violence in the commission of the burglary to establish a significant history of felonies under 42 Pa.C.S. § 9711(d)(9). *Id.*[7] The Court also concluded that by reading the transcript, the Commonwealth presented the facts in a way that minimized the inflammatory impact.

The Court has thus already decided on direct appeal that the rape victim's testimony was admissible. Nonetheless, Appellant now argues that prior counsel was ineffective for not bringing *Commonwealth v. Rolan,* 520 Pa. 1, 549 A.2d 553 (1988), to the attention of the trial court and this Court on direct appeal. Appellant maintains that under *Rolan,* it was only necessary to introduce evidence of his burglary conviction to establish a felony involving the threat or use of violence.[8]

[7] In *Christy,* the Commonwealth introduced evidence of the defendant's prior burglary conviction to establish the aggravating factor. The Commonwealth did not introduce evidence showing that the burglary involved the threat or use of violence. On appeal, the Court stated that the Commonwealth must present evidence that the defendant actually threatened or used violence to include a felony under 42 Pa.C.S. § 9711(d)(9). 511 Pa. at 507-08, 515 A.2d at 840-41. However, since the jury did not find the aggravating factor, the Court held that the error was not prejudicial. *Id.*

[8] In *Rolan,* the Commonwealth introduced evidence of the defendant's prior burglary convictions in order to establish the aggravating factor. Appellate counsel argued that trial counsel was ineffective in allowing the evidence since burglaries are not felonies involving the use or threat of violence. The Court held that burglary is a crime involving the use or threat of violence and found counsel effective. 520 Pa. at 15, 549 A.2d at 559-60. It stated that the discussion in *Christy* as to the

(Continued on following page)

As stated above, a claim that has already been litigated cannot be revisited by alleging ineffective assistance of prior counsel and presenting new theories of relief. *Commonwealth v. Peterkin,* 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994). Even if it could, Appellant's claim does not have arguable merit. Regardless of the applicability of *Rolan,* the Commonwealth was entitled to introduce facts surrounding the burglary conviction. *See Commonwealth v. Jones,* 542 Pa. 464, 523-24, 668 A.2d 491, 520 (1995); *Commonwealth v. Beasley,* 505 Pa. 279, 288, 479 A.2d 460, 465 (1984). The Commonwealth may place the underlying facts of prior convictions before the jury so that it is able to assess the weight to be given to the aggravating factor. *Jones,* 542 Pa. at 523-24, 668 A.2d at 520. Here, when Appellant's trial counsel objected to the testimony and then offered to stipulate that the burglary is a crime of violence, the Commonwealth properly argued that the jury was entitled to know the underlying facts. *See* N.T., 11/1/88 at 33-38. Thus, no relief is due on this claim.[9]

Appellant next argues that his due process rights were violated because the trial court did not answer the jury's question about his parole eligibility. During jury deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" N.T., 11/2/88 at 73. The trial court responded:

evidence necessary to establish the aggravating factor was dicta since the jury did not find the aggravating factor. *Id.* n. 5.

[9] To the extent the Court's decision on direct appeal in this case departs from *Rolan,* this Court has since affirmed the principles in *Rolan*. *See, e.g., Commonwealth v. Gibson,* 720 A.2d 473 (Pa. 1998).

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

Id. at 73-74. Appellant argues that the jurors should have been told that a life sentence means life without parole under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), which mandates such an instruction when a defendant requests it and his future dangerousness is at issue.

Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998). Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The Court rejected this argument in *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44, 47 (Pa.1998). As stated in that case, this aggravating circumstance only addresses Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due.[10]

[10] This author agrees with the dissent's position that a *Simmons* instruction should be given in all cases and has previously so stated. *See Clark,* 710 A.2d at 43-44 (Nigro, J., concurring, joined by Flaherty,
(Continued on following page)

Next, Appellant argues that the trial court erred in failing to excuse a juror for cause and that trial counsel failed to challenge him for cause. This argument was not raised in Appellant's PCRA petition or in the proceedings before the PCRA court. Thus, Appellant has waived this claim. *See Commonwealth v. Albrecht,* 720 A.2d 693 (Pa. 1998).

Appellant next argues that this case should be remanded to the Court of Common Pleas for a hearing on recently discovered claims related to alleged violations of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This issue has already been litigated. Appellant filed a remand motion in this Court on March 10, 1997 alleging the possibility of misconduct by the Federal Bureau of Investigation in the handling of evidence in this case. This Court entered an order denying the motion for remand on May 20, 1997. Appellant now summarizes his remand motion and offers no reason why this Court should reconsider its earlier ruling. No relief is due on this claim.

Lastly, Appellant argues that he is entitled to a new trial and sentencing proceeding because the prejudicial effects of the cumulative errors in this case undermine confidence in the outcome at both stages of the trial. The Court rejected a similar argument in *Commonwealth v. McGill,* 545 Pa. 180, 680 A.2d 1131 (Pa.1996). In that case, the defendant's individual claims of error failed for lack of

J. and joined in relevant part by Zappala, J.); *May,* 710 A.2d at 49 (Nigro, J., concurring, joined by Zappala, J.). Under the current state of the law, however, Appellant's argument that he was entitled to the instruction because the Commonwealth argued the aggravating circumstance identified above, is without merit. *See May,* 710 A.2d at 47.

merit. As such, there could be no prejudicial cumulative effect when there was no harm in the first place. *Id.* 680 A.2d at 1136. The same is true here.

Having found that none of Appellant's claims warrants relief, the order of the Court of Common Pleas is affirmed.

Chief Justice FLAHERTY files a Dissenting Opinion.

Justice ZAPPALA and Justice NEWMAN concur in the result.

FLAHERTY, Chief Justice, dissenting.

I believe the majority is in error in its treatment of the issue pertaining to the jury's question about the defendant's parole eligibility. Under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998), the court must tell a jury that a life sentence means life without parole, if the defendant requests the instruction and his future dangerousness is at issue. Here, during deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" I view this question as a clear expression of the jury's concern about the defendant's future dangerousness. I would therefore hold that the trial court's refusal to explain the meaning of life without parole constituted error under *Commonwealth v. Clark, supra*. I would therefore reverse the order of the court of common pleas and remand for proceedings consistent with this opinion.

I would go further and require an explanation of the meaning of a life sentence in all capital cases. There can be no harm in instructing juries that in Pennsylvania

appellant would be statutorily ineligible for parole if sentenced to life in prison, but that a life sentence might nonetheless be commuted by the governor. On the other hand, if we do not so instruct, a jury, erroneously believing that a prisoner sentenced to life may be paroled within a period of years, may impose the death penalty for reasons which are not based in law.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD ROMPILLA, Petitioner, v. MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; PHILIP L. JOHNSON, Superintendent of the State Correctional Institution at Greene, and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview, Respondents.	CIVIL ACTION No. 99-737 JUDGE BUCKWALTER

PETITION FOR A WRIT OF HABEAS CORPUS AND CONSOLIDATED PRELIMINARY MEMORANDUM OF LAW

Petitioner, Ronald Rompilla, through undersigned counsel, hereby files this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1]

* * *

[1] All emphasis herein is supplied unless otherwise indicated.

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CLAIMS FOR RELIEF

I. TRIAL COUNSEL WERE INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT MITIGATING EVIDENCE RELATED TO PETITIONER'S TRAUMATIC CHILDHOOD, ALCOHOLISM, MENTAL RETARDATION, COGNITIVE IMPAIRMENT AND ORGANIC BRAIN DAMAGE.

9. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

A. Introduction.

10. The importance of mitigating evidence in capital sentencing proceedings is a fundamental tenet of the United States Supreme Court's jurisprudence. *E.g.*, *Eddings v. Oklahoma,* 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978). A constitutionally reliable capital sentencing proceeding requires that the jury render an individualized decision only after full consideration of the mitigating evidence regarding the individual defendant before them. *Gregg v. Georgia,* 428 U.S. 153, 206 (1976); *McCleskey v. Kemp,* 481 U.S. 279, 304 (1987); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976).

11. A jury cannot make the life-or-death sentencing decision in a reliable, individualized and constitutional way without knowing the actual mitigating evidence about the defendant. Thorough investigation and presentation of mitigation are therefore absolute prerequisites to constitutionally effective assistance of capital counsel. The core Eighth Amendment principle that "respect for humanity" requires consideration of mitigating information about the offender, *Lockett,* 438 U.S. at 602 (quoting *Woodson,* 428 U.S. at 304), allows for no less.

12. Here, trial counsel failed in their duty to investigate, develop and present the available mitigating evidence, and Petitioner's capital sentencing jury was not presented with the overwhelming mitigating evidence that was actually available.

13. As described below, trial counsel failed to investigate, develop and present a wealth of documentary evidence describing Ronald Rompilla's traumatic childhood and lifelong history of mental retardation, cognitive impairment, psychological problems and alcoholism. Mr.

Rompilla's medical, school, prison and court records – all predating the time of trial – show that he suffered from serious medical problems as a young child; he suffered extreme neglect at the hands of alcoholic parents; he consistently received mentally retarded scores on IQ tests; he was never able to learn; his achievement test scores were in the lowest ranks; he was placed in special education classes, where he remained until he finally left school; he was still cognitively and psychologically impaired as an adult; and he has had a lifelong struggle with alcoholism.

14. Trial counsel, however, made *no* attempt to obtain *any* school, medical, prison or court, or any other records about Petitioner and his life. These records were not obscure or difficult to find. They were readily available. Indeed, some were available in the courthouse where the trial took place and others were across the street from the courthouse. Because of counsel's inadequate investigation, however, the jury did not hear any of this mitigating evidence.

15. Counsel also failed to investigate, prepare and present mitigating evidence showing that Ronald Rompilla was raised in a frightening, emotionally and physically abusive home. Both of his parents were alcoholics. His mother drank heavily even when she was pregnant. The parents were violent toward each other, and (especially the father) toward Ronald and the other children. Ronald was beaten regularly and viciously by his father; the father also devised bizarre and humiliating punishments for Ronald; and the father isolated Ronald and his siblings from outside contact or assistance. Ronald's siblings do not recall a single happy event in the family home. Instead, Ronald's childhood was an endless stream of abuse, mistreatment and neglect. Because of counsel's inadequate

investigation, the jury did not hear any of this mitigating evidence.

16. Counsel also failed to investigate, prepare and present mitigating evidence of Petitioner's struggle with alcoholism. Following in his parents footsteps and trying the blunt the pain of abuse and neglect he suffered, Ronald Rompilla (like his brothers) became an alcoholic. He suffered from blackouts and other debilitating effects of his alcohol addiction. Because of counsel's inadequate investigation, the jury did not hear any of this mitigating evidence.

17. Counsel also failed to investigate, prepare and present mitigating evidence showing that Petitioner suffers from organic brain damage, and so suffered at the time of the offense and throughout his life. As even the Commonwealth's expert witness agreed, Petitioner's brain damage has had drastic, debilitating effects on his personality and ability to function: it impairs and undermines his judgment, reasoning, cognition, mental flexibility, impulse control, emotional lability, ability to understand and respond appropriately to his environment, ability to predict the consequences of behavior and ability to control his behavior. Because of his brain damage, especially when combined with the childhood abuse he suffered and his alcoholism, Mr. Rompilla suffered at the time of the offense from an extreme mental and emotional disturbance and was substantially impaired in his capacity to appreciate the criminality of conduct or to conform his conduct to the requirements of law. Because of counsel's inadequate investigation, the jury did not hear any of this mitigating evidence.

18. Counsels' failure to investigate, prepare and present this overwhelming mitigating evidence of childhood abuse and suffering, alcoholism, mental retardation, cognitive impairment and organic brain defect rendered the death sentencing proceedings fundamentally unfair and unreliable, in violation of the Sixth, Eighth and Fourteenth Amendments.

B. Factual Background.

19. Facts relevant to this claim include the testimony presented at the capital sentencing hearing and testimony and documentary evidence presented in post-conviction, showing that counsel ineffectively failed to investigate, develop and present substantial mitigating evidence.

1. The evidence presented by trial counsel at capital sentencing.

20. At the capital sentencing proceeding, trial counsel raced through the testimony of several of Petitioner's family members. Not one of these witnesses was asked about Petitioner's abusive and neglectful upbringing; his head injuries; his mental retardation; his inability to succeed in school or in life; his placement in special education; his chronic and debilitating life-long alcoholism; his parents' alcoholism; his mother's excessive drinking during pregnancy, etc. *See* NT 11/2/88 at 4-30.

21. Instead, these witnesses were asked about Mr. Rompilla's "helping out around the house" in the few months between the time when he was released from his last ten year jail sentence and the time of the instant offense. Counsel failed to even begin to present the background and

mental health mitigation that would have shed light on *why* Mr. Rompilla has spent all but two years in prison since the age of fifteen.

2. The evidence presented post-conviction.

22. The evidence presented in post-conviction proceedings shows the substantial mitigating evidence that effective counsel could have presented at capital sentencing.

23. **Barbara Harris** is Petitioner's sister. She is six years older than he, and is the oldest of his siblings. NT 3/29/96 at 199. Ms. Harris described the terrible problems that plagued Petitioner's family during his childhood, and the effects of those problems on Petitioner.

24. Ms. Harris explained that both of Petitioner's parents were very heavy drinkers. *Id.* at 201-02. Petitioner and his brothers also developed serious drinking problems. *Id.* at 205. Indeed, one brother (Richard) "died from drinking. He had a brain hemorrhage. He had sclerosis of the liver. His kidneys failed." *Id.* Petitioner's mother was an alcoholic who "drank from day to night" – "every day, seven days a week." *Id.* at 201, 215-16. The mother drank in the same excessive way when she was pregnant. *Id.* at 206-07, 211.

25. The parents often had violent fights in front of Petitioner and the other children. *Id.* at 207, 215-16. The father had an especially violent temper. *Id.* at 212, 215-16. Ms. Harris and her youngest brother were favored by the father, and the father did not beat her. *Id.* at 200-03. But the father and the mother often beat and abused Petitioner and the other children. *Id.* at 200-02. Petitioner was

"[h]it all the time, picked on" by the parents. *Id.* at 202-03, 217. He was beaten at least "three times a week," with hands and belts – often in the face. *Id.* at 200-01. Ms. Harris sometimes tried to intervene and stop the father from beating Petitioner, but the father "was a big man" and "he just pushed me aside." *Id.* at 210.

26. Petitioner suffered more than just physical abuse. His childhood home was also emotionally cold and abusive. The children never had adequate clothing. *Id.* at 203. Petitioner never got any praise from his parents. The parents never told him they were proud of him. Ms. Harris never once heard either parent say anything nice or affectionate to Petitioner. *Id.* at 203-04. Instead, the parents constantly "hollered at" him that he was "dumb" and "stupid" and told him that he "wouldn't amount to anything." *Id.* at 204.

27. Ms. Harris described some of the effects that this childhood had on Petitioner. Petitioner "was always a different child" who "felt lost and rejected." *Id.* at 215-16. He "cried a lot. He was quiet, kept everything inside. He was very nervous." *Id.* at 204, 207. He became "the type of person who would sit by himself and say nothing." *Id.* at 216.

28. The jury never heard any of this evidence. No one from the defense team talked to Ms. Harris at the time of trial. If someone had asked her at the time, she would have told them all of the above and would have testified. *Id.* at 209-10.

29. **Randi Rompilla** is Petitioner's sister. She is four years younger than he. NT 3/29/96 at 127. In highly emotional testimony, *see, e.g., id.* at 138, 162, she described

the abusive, violent, alcohol-soaked household in which Petitioner grew up.

30. Both parents drank heavily – "they drank until they were drunk." *Id.* at 128. The mother was an especially heavy drinker. She "always drank, always" – "that was her breakfast [and] [s]he drank till nighttime." *Id.* at 128, 141. The mother did not stop drinking even when she was pregnant. *Id.* at 141-42. Ms. Rompilla explained that her mother's severe drinking problem stemmed in part from the fact that "my dad beat her, you know, and he cheated on her." *Id.* at 128. Petitioner and his brothers acquired their parents' serious drinking problems. Petitioner's brother, Richard, died from sclerosis of the liver because of his alcoholism. *Id.* at 167.

31. The parents' relationship with each other was hateful and violent. The father frequently beat the mother. *Id.* at 128. He "was the type of man that, when he cheated on her, he'd come home and brag about it." *Id.* at 136. Knowing that her husband was seeing other women, the mother would search for the father and his girlfriend and when she would catch them she would "attack her and my father." *Id.* at 137. Ms. Rompilla especially recalled an incident in which the father "had the gall to park behind our backyard . . . with Mary, his girlfriend in the car, and [the mother] seen them there. And when he came into the house, she just picked up the knife and stabbed him." *Id.* at 128, 136.

32. Petitioner and the other children were subjected to relentless physical and emotional abuse and neglect by both parents. It was "a very abusive family." *Id.* at 128. The violence came from both parents, but especially the father. *Id.* at 127-30. The children were beaten often –

with fists, belts, leather straps and brooms. *Id.* at 127-28, 134, 144. The children's grandfather was also a frightening figure: "[G]randfather was an evil man. . . . I think that's why my dad was the way he was." *Id.* at 134. "He wasn't loving. He was cold-hearted. And that's exactly how my dad was." *Id.* The children were "afraid of" their grandfather. *Id.*

33. The father beat Ronald Rompilla often:

> He just swung with that big leather strap. He didn't care if he hit your back, your head – he didn't care.
>
> * * *
>
> I mean, he was drunk half of the time. And when he wasn't drunk, he still swung. He did not care. I mean, he just did what he wanted to do.

Id. at 144. "Ronald tried to . . . get away from the blows" but he could not escape, and "he just cried. We all cried. We cried, we screamed, and [the father] didn't care. He just did what he wanted." *Id.* at 145.

34. The father's abuse of Ronald Rompilla and was so frightening that it caused Ms. Rompilla to have nightmares – nightmares that still haunt her to this day. *Id.* at 137:

> When the boys got beaten, I used to climb the walls and just scream get me out of here. And to this day I do have the same nightmares, and my husband has to hold me down until it subsides, because I'll never forget it.

Id. at 130.

35. The father also devised bizarre punishments for Petitioner and his brothers. For example, Ronald and his brother Richard were locked by the father in a "dog pen." *Id.* at 128. The dog pen in which Petitioner was caged

> was like a wire mesh. . . . [The father] would lock Richard and Ronald in it, and then he'd just go back in the house. And you couldn't stand in it. You had to be hunched in it. . . . [T]hey were like hunched over or kneeling until my dad left them out.

Id. at 132.

36. The pen was filled with dog excrement – "it was filthy." *Id.* The boys sat silently while locked in the dog pen because they feared their father – "you had to follow my dad's rules. If you didn't follow – you couldn't go up against my dad." *Id.* at 133.

37. The father's treatment of Ronald and the other children was disturbing in many other ways. The children were isolated from other people. They were not allowed to visit other children or bring other children to their house. "When you came home from school, you stayed in or you were allowed in the backyard. You couldn't bring your friends and that." *Id.* at 144.

> We couldn't have friends come in. . . . It was school, come home, and nothing else. There was no phone calls. If anybody called us up, it was "Hang up." We couldn't go to, you know, games, school games or anything. There was just no outside connection with anybody.

Id. at 131.

38. The violence and isolation suffered by the children were accompanied by constant surveillance from the father:

> [M]y dad wouldn't give us a bedroom door. He told his brother Rudy to take all the doors off, that we didn't need any doors. And he made Ronald sleep up in the attic. And there was no heat up there. But that was his bedroom. And then if we had to change or something, we'd just like go behind the dresser. Because my dad didn't want to give us any privacy.
>
> * * *
>
> He didn't want us to have any privacy. . . . [H]e just wanted to watch us. He'd go in our drawers. I mean, he was a strange father. He didn't even have a bedroom door on his bedroom. I mean, we could walk by. He was lying there. He didn't care.

Id. at 135.

39. The parents would not buy clothes or school supplies for Ronald and the other children. *Id.* at 127, 139. Instead, the father would give what little money he had to his girlfriend's children – "instead of us getting the money for the clothes and what we needed for school supplies, he would give it to her kids." *Id.* at 136. The Rompilla children were humiliated by "going to school knowing that [they were] beaten at home and then go to school the next day and look at kids with nice clothes," when they were dressed in "rags." *Id.* at 137.

40. The father would even take money from the children, and if they would not give it up he would beat them. *Id.* at 139. "He wanted all the money, and he would spend it the way he [wanted] – like on his gambling. He

played cards heavily. He drank. He spent it on Mary [his girlfriend]. . . . [W]e were deprived." *Id.* at 139-40. The children "didn't have no parties, no birthdays." *Id.* at 128. The parents "didn't take [Ronald and his brothers] fishing, baseball games, nothing." *Id.* at 131. Ms. Rompilla "couldn't even tell you an event, like we all went out as a family and we enjoyed ourselves." *Id.* at 143.

41. The children's physical deprivation, isolation and abuse was combined with traumatic emotional and psychological mistreatment. The parents never helped Ronald or his siblings with their school problems. NT 3/29/96 at 143. They

> didn't put no money in the bank and say, "When you grow up, you can go to college." No. You were stupid, and you weren't going to be anything. And over the years [the father] said that to the boys over and over again. Then he used to take me and Ronnie and circle Camp Hill [prison] and tell Ronald, "If you don't behave, this is where I'm putting you." And so over the years when he took us, how could – how could he grow up to be anything like for a father to be proud of when that's all my dad was was abusive with kids? He didn't love us. It was like all threats and beatings. We just didn't have a chance, and we had nobody to really go to. And that's how it was, really, in our life.

Id. at 140.

42. The father's verbal abuse and belittlement were constant – "he was always saying" vicious, hurtful and frightening things. *Id.* at 143. Ms. Rompilla could not recall a single nice thing ever said to her or her siblings by the parents. Instead, all the parents ever told the children

was that "We were stupid. We'll never amount to nothing." *Id.* at 130. "We were there just to watch them drink and abuse us." *Id.* at 143.

43. Ronald Rompilla grew up in a family where "[w]e weren't loved," *id.* at 127, and from which there was no escape or help:

> There was no love in our family. None. You didn't get a hug. You didn't get "good night." You didn't get a "happy birthday." You got nothing. You just had to do what he [the father] said. And if you didn't do it, you got beaten. And my mom over the years drinking, and she was abused by my dad, she just – we were deprived of a mother. We weren't loved. . . . And we were deprived. We didn't get any counseling. We didn't get any help. . . . [W]hen we went to school and they said that there was something wrong, we should have, you know, someone talk to us because we went to school being abused, my dad would lie and say, "Nothing happened. Nothing's wrong."

Id. at 129-30.

44. Ronald Rompilla was

> brought up with no love, no nothing. He was always in trouble because of my father. He was beaten. He wasn't loved. He got nothing. And if he wanted something, "No, you're not getting it."

Id. at 156. "We were abused kids. We were beaten. We had no love. That is true." *Id.* at 161.

45. The jury never heard this compelling evidence of Petitioner's deprived, neglectful, abusive childhood. No one on the trial defense team ever approached Ms. Rompilla, asked her to testify, or asked her about Petitioner's

childhood. *Id.* at 142, 156-57. She attended the trial, would have testified if asked, and would have told the jury the above information about Petitioner's life. *Id.* at 142-43, 159.

46. **Nicholas (Nick) Rompilla, Jr.** is Petitioner's older brother. NT 3/29/96 at 169. Like his siblings, Nick Rompilla described the violent, neglectful and emotionally cold home in which Petitioner lived as a child.

47. The father drank "every day," and drank to intoxication "like four times a week." *Id.* at 170. The mother also "drank every day" – "she would start in the morning, and she wouldn't finish till she went to bed. And that's seven days a week." *Id.* at 171. The mother never slowed in her drinking, even when she was pregnant with Petitioner and the other children. *Id.* at 172. When she was pregnant:

> She drank to the day that she went to the hospital. She would drink when she knew she was going – when she was going to deliver. My dad wasn't around. She would drink . . . and then she would walk to the hospital . . . , and she would deliver the kid, the baby.
>
> * * *
>
> She drank every day. Every day. She never stopped.

Id. at 171.

48. The family was very poor and lived in a house with no indoor plumbing. *Id.* at 178. The children "didn't have nothing. We were on our own." *Id.* at 178. The father "was abusive" to his wife and the children. *Id.* at 170. The parents fought violently and often: "He would punch her. She would have black eyes. She'd be bruised." *Id.* at 180. The father hit the children with his hand, his fist, "with a

belt, broom, stick." *Id.* at 172. He hit the children "[w]herever his hand reached" including on the head. *Id.* at 180, 184. The children were beaten regularly – several times a week, beginning from "when they was just babies." *Id.* at 183, 197. And "when he hit, he hit you hard. You felt it. You flew." *Id.* at 195. Nick Rompilla recalled more than one time when the father hit him so hard it knocked him out. *Id.* at 194.

49. The parents never showed any affection or approval to the children. *Id.* at 177. The father

> was always putting us down. You know, if you didn't do something right, he would call you a nitwit, whack you across the head. "You'll never learn. You'll be stupid." He done that for years. Even if I would go over there today and talk to him, he says, "You're still stupid." That's the way he was.

Id. at 176. The father "didn't do anything for the family. He didn't take us nowhere. He didn't do nothing. We were just there." *Id.* at 177. Nick Rompilla could not recall any happy occasions in the household. *Id.*

50. Nick Rompilla described how the horrors of the household affected the children's lives:

> [L]ook at my life. I did almost eleven and a half years [in jail], you know. The only reason I got away from the situation was I found it better to go to jail. And that's exactly what I did. I didn't have to be with the family. I didn't have to see this. It got to the point where I told my dad I'd kill him, if you want to know. . . . I said, "I should have killed you years ago, because you brought the family nothing but misery." I mean, he's my father. I hate to talk like this. But, look, I went

through it. A lot of them went through it. My family.

Id. at 191.

51. The abuse and neglect clearly affected Petitioner – he was "[q]uiet, drawn back" as a child. *Id.* at 178. He drank excessively before he went to jail in the 1970's. *Id.* at 181. Petitioner lived with Nick Rompilla when he got out of jail in 1987, and he resumed his excessive drinking again about a month after he got out. *Id.*

52. The jury never heard this evidence about Petitioner's background. Nick Rompilla testified at Petitioner's trial, but "nobody ever asked" him about the family background. *Id.* at 182. When the lawyers discussed his testimony with him, "[t]he only thing was just about the three months he was out [before being arrested]. They didn't ask anything about childhood or anything like that." *Id.* at 183. He "wasn't asked these questions" about the family and Petitioner's background – "It was just during the three months that he was out. That was it. The three months he was out, that's all he asked about." *Id.* at 182, 187-89. The trial lawyers never asked about being hit by the parents; the parents' drinking; the parents' fighting, etc. *Id.* at 197-98. Nick did not discuss these matters with the attorneys because "[t]hey never asked." *Id.* at 191.

53. Petitioner's **hospital records** (Exhibit 10), which resulted from his hospitalization in Sacred Heart Hospital at age two, show that when Petitioner was two years old he was hospitalized for "Diarrhea due to undetermined cause" and a fever that exceeded 105 °F.

54. Trial counsel did not obtain or make use of these records.

55. Petitioner's **school records** (Exhibit 11) were obtained by post-conviction counsel from the Board of Education, which is located across the street from the Court of Common Pleas courthouse. Although these records were not voluminous, they include test results indicating that Petitioner's IQ scores were consistently in the mentally retarded or borderline mentally retarded range, as well as several other indications of cognitive deficits and family dysfunction.

56. The IQ test dates[2] and scores include:

- September 1954: IQ in the 60's
- April 1957: WISC[3] IQ=75
- October 1959: WISC Verbal IQ=61, Performance IQ=75, Full Scale IQ=64
- December 1961: WISC Verbal IQ=69, Performance IQ=75, Full Scale IQ=69

57. These IQ scores are all in the *mentally retarded* (69 and below) or *borderline mentally retarded* (70-79) ranges.

58. The school records also show that Petitioner was placed in special education classes starting in the fourth grade, where he remained until he left school in ninth grade. Achievement test scores in the school records show that Petitioner's abilities never progressed beyond the third grade level throughout his schooling.

---

[2] Petitioner was born in 1948.

[3] The "WISC" is the "Wechsler Intelligence Scale for Children," a standardized, reliable and widely used measure of intelligence in children.

59. The school records also indicate that school officials could obtain "no cooperation" from Petitioner's father.

60. Trial counsel did not obtain or make use of these records.

61. **Court and prison records** relating to Petitioner (and pre-dating the offense and trial) were obtained by post-conviction counsel. These records contain significant background information about Petitioner, including evidence of his cognitive dysfunction, psychological disturbance, alcoholism and dysfunctional childhood home.

62. The Court of Common Pleas file from Petitioner's prior rape/burglary conviction, which is maintained in the Clerk's office at the Lehigh County Courthouse and was so maintained at the time of the trial and sentencing hearing, *see* NT 3/28/96 at 206, includes a 1976 "Initial Transfer Petition and Initial Classification Summary" (Exhibit 12), prepared by the Pennsylvania Department of Corrections ("DOC").

63. These DOC records contain very low Wide Range Achievement Test ("WRAT")[4] scores that are consistent with the very low scores in Petitioner's school records, and show that Petitioner still had not progressed beyond the third grade level in spelling and arithmetic, putting him below approximately 97% of the population in these areas. These DOC records also contain scores from a Minnesota Multi-Phasic Personality Inventory ("MMPI") test administered to

[4] The WRAT is a standardized, reliable and widely used measure of achievement.

Petitioner in 1976.[5] As described in more detail below, these MMPI scores are abnormal and psychologically significant, and show highly elevated scores on the schizophrenia and other scales.

64. These DOC records also indicate that Petitioner had a history of "over-indulgence in alcoholic beverages"; that he needed "counseling pertaining to his long standing abuse of alcohol"; and that he was the "6th of nine children raised in the slum environment of Allentown, Pa. vicinity."

65. These DOC records also refer to Petitioner's Juvenile Court history (Exhibit 13), which contains further significant information. For example, a Juvenile Court "summary" prepared on November 27, 1964 (when Petitioner was sixteen years old) describes some of the dysfunctional conditions in Petitioner's childhood home:

> In 1945 the City Health Department . . . became interested in this family. . . . Following this, the Probation Office was alerted of *neglected children*. . . . September 6, 1945 the *mother was picked up by the police in a drunken condition* at which time the Probation Office was obliged to enter into the home and family; the children were placed in a hospital and the home of relatives at that time. . . . [After 1946,] [*o*]*ver a period of years the mother was missing from home frequently for a period of one or several weeks at a time*; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. . . . She has been reported over a period of years to be

[5] The MMPI is a standardized test that is widely used by mental health professionals.

frequently under the influence of alcoholic beverages, with the result that *the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.*

66. The Juvenile Court file also contains an "Informative Report" from the Allentown School District, dated November 20, 1964, noting that Petitioner's IQ score was 69;[6] and stating that "Ronald is easily influenced by others into different events, no matter if it is bad or good."

67. Moreover, Petitioner's "Juvenile Case History" notes that other relevant information about his family history is contained in the Juvenile Court records of Petitioner's brother, Nicholas Rompilla, Jr. These records (Exhibit 14) are also revealing.

68. A letter from Raven H. Ziegler, Chief Probation Officer, to Windell W. Powell, Superintendent of the Glenn Mills School, dated April 6, 1957, when Petitioner was nine years old, states: "I regret to say that *the home conditions in this [Rompilla] family group have not changed.* The mother *still is neglecting her children with filth and lack of supervision existing at all times.*" A Probation Department "summary" from October 7 of that same year notes that the Rompilla children had been reported to be "neglected"; that the mother had been "picked up by the police in a drunken condition"; that, because of the neglect and the mother's drunkenness, the children were removed from the home and "placed in a hospital and homes of relatives"; that "the mother was frequently missing from

[6] As stated above, the school records indicate that Petitioner's full scale WISC IQ was measured to be 69 in December 1961.

the home for weeks at a time" and that "[t]he children at all times have been poorly kept, always on the filthy side, as well as the mother; the house always showed signs of neglect."

69. A Department of Corrections "Classification Summary," dated May 13, 1960, when Petitioner was twelve years old, notes that in the Rompilla family, the "father-son relationships were weak"; the mother was an "alcoholic" with "a history of drinking" who was "often off with other men" and away from "home [for] weeks at a time"; there were "poor home conditions" and "an unstable home situation"; there was "[n]eglect of children"; and the "children were always dirty."

70. Trial counsel did not obtain or make use of any of these records.

71. **Police reports** (Exhibit 15), provided to trial counsel in discovery, reflect Petitioner's alcoholism and his heavy drinking on the night of the offense:

- When Petitioner was arrested for this offense, his "Parole Officer was with us [the police]. At this time he told Ronald Rompilla that he was being violated and sent back to jail because of *his drinking bout all night*";
- A witness reports that she met Petitioner "at Candida's bar" at 4:00 p.m. on January 15, 1988, and:
  - "he *bought rounds of drinks* for everybody, about two or three rounds";

- they then "went to the Franklin Fire Company, *he bought a couple rounds of drinks* for everybody there,"
- they then "went to the Madison Inn and *he bought some rounds of drinks* there, about two rounds of drinks for everybody";
- Petitioner stated that he had "spent over five hundred dollars today on drinks."

Allentown Police Bureau Investigative Report, 15-JAN-88, sheet 6, 7;

- a witness reports that on January 13, 1988 "sometime in the early afternoon he was with Ronald Rompilla ... at the Linden Hotel and that *they were consuming alcoholic beverages*";
- "sometime in the afternoon ... they left the Linden Hotel and proceeded to Hondo's Bar ... and that they remained there *again drinking alcoholic beverages*";
- "he then describes his intoxication and *Mr. Rompilla's intoxication as both being drunk*";
- "He described *Mr. Rompilla's intoxication as more severe than his*";
- "*Mr. Rompilla as he describes passed out on the floor*"
- motel employees "state that *Mr. Rompilla seemed drunk or high* at the time

he signed in in the early morning hours of the 14th of January, 1988"

Allentown Police Bureau Investigative Report, 16-JAN-88, sheet 2, 3;

- Petitioner "arrived approx 5 AM on 1-14-88 and checked in [to motel] ... *he was not very coherent and could not find it [the room] on his own*"

George Washington Lodge Incident Report (1/15/88, 2:30 a.m.).

72. Counsel did not investigate or present any evidence of Petitioner's alcoholism or drinking at the time of the offense.

73. **A commutation recommendation** (Exhibit 16) was prepared in 1995 by Dr. Kate Erwin, Chief Psychiatrist for the Pennsylvania Department of Corrections at the State Correctional Institution-Pittsburgh.[7] After seeing and evaluating Petitioner in 1995, Dr. Erwin recommended that his death sentence be *commuted*. Dr. Erwin's commutation report states:

> Mr. Rompilla is a 47 year old white serving an execution sentence for which he has been incarcerated since 1988. He apparently was drinking which is typical of him when he [sic] out of prison and during a blackout murdered someone. He also committed a rape for which he was sentenced some time ago under the same circumstances. He has a very significant alcohol

[7] Dr. Erwin's reports were admitted for both their facts and their opinions. NT 3/28/96 at 4.

problem which includes frequent blackouts. It is apparently is during these blackouts that he has committed his crime. . . . He has been in institutions since age 15, and reports that he had been out of prison for only approximately two years since that time. . . .

DIAGNOSIS: Axis I: Alcohol dependence in remission due to incarceration

* * *

RECOMMENDATIONS: Commutation is recommended

July 3, 1995 Report by Kate Erwin, M.D.

74. A March 24, 1995 Annual Psychiatric Report from Dr. Erwin notes:

- "whenever he gets out of prison he drinks very heavily and has frequent blackouts"
- "dropped out of school after 9th grade and started drinking heavily that summer"
- mother "herself did drink a fair amount at home"
- "borderline intelligence (WAIS=79)"

75. **Dr. Carol L. Armstrong** is a psychologist and neuropsychologist. Deposition of Carol Armstrong, Ph.D., at 3 (April 2, 1996). She is an Assistant Professor in the Department of Neurology at the Hospital of the University of Pennsylvania. She evaluated Petitioner on March 5, 1996, when she spent about five hours with him, administered a battery of neuropsychological tests, interviewed

him, and, reached conclusions to reasonable degree of psychological and neuropsychological certainty. *Id.* at 9-10.

76. Dr. Armstrong described the tests she administered and the results of her neuropsychological testing and evaluation. *See Id.* at 10, *et seq.* It is "very clear" from the testing that Petitioner suffers from *organic brain damage. Id.* at 26-27, 38, 39. Petitioner's brain damage includes parietal area dysfunction, *Id.* at 13, and frontal lobe dysfunction, *Id.* at 13, 23, 26, and causes numerous significant and severe impairments in his emotional, psychological and cognitive functioning.

77. Dr. Armstrong also explained that Petitioner was not malingering or trying to appear impaired. The test results are *not* the "product of poor motivation. He's very motivated." They are *not* "the product of faking of any kind. They are *not* the product of poor education." *Id.* at 38-39. *See also Id.* at 29-30 (no evidence that Petitioner was malingering or falsifying in any way; validity control tests shows he was trying his best); *Id.* at 76 ("the performances I got from him were the best he was capable of. That means he was not faking."); *Id.* at 80 (Petitioner was trying hard and was pleased when he did well).

78. As a result of his brain damage, Petitioner suffers from numerous debilitating impairments. He suffers from severe cognitive impairments. *E.g., Id.* at 35. This is consistent with all the records pre-dating the trial, including the school records and the psychological testing reflected by the prior court and DOC records. *E.g., Id.* at 44, 47-49.

79. "Cognitive abilities are very important for all components of a person's life; their social behaviors, their family behaviors, certainly their emotional behaviors,

their work behaviors, even their recreational behaviors." *Id.* at 37-38. In an unimpaired individual, the primitive, emotional part of the brain is controlled by "a more advanced part of the brain" which contains "monitoring, reasoning capacities." Unimpaired people "use our cognitive abilities to control and monitor and mediate that emotion." *Id.* at 37. In Petitioner's case, however, these cognitive, emotion-controlling, abilities are significantly impaired by his organic brain damage.

80. Petitioner's brain damage impairs "his ability to control, to guide his behavior." *Id.* at 85. His "cognitive impairments . . . cause him to act without thinking." *Id.* at 85. His reasoning ability is "severely impaired." *Id.* at 33. He cannot "respond appropriately to the environment and . . . think something through in just a reasonable fashion." *Id.* at 31. He is "unable to maintain mental set" – i.e., he cannot keep a train of thought. *Id.* at 34. "He has a big problem with distracters" – "his thoughts are constantly being interrupted and he's not able . . . to follow a train of thought which is necessary to solve problems." *Id.* His deficits adversely affect and impair his judgment "because he would be making judgments with basically invalid information." *Id.* His deficits adversely affect and impair his ability to measure future consequences of his behavior – "He's unable to make a plan" and is not "able to think of all the implications of an action." *Id.* at 35. His behavior is governed by "what's immediately in front of you and not in terms of consequences." *Id.* at 36. His deficits cause him to be emotionally labile and have "impulse control problems." *Id.* at 36-37.

81. Dr. Armstrong's evaluation and testing show that Petitioner suffered from this brain damage and these impairments throughout his life and at the time of the

offense. *Id.* at 27-29, 39-40. His brain damage dates back "at least to childhood," and quite possibly was pre-natal in origin. *Id.* at 28, 40, 44. As a result of his organic brain damage, at the time of the offense Petitioner suffered from an extreme mental and emotional disturbance, and his capacity to appreciate criminality of conduct or conform his conduct to requirements of law was substantially impaired. *Id.* at 40.

82. Dr. Armstrong also discussed the significance of Petitioner's school, hospital and prison/court records and his abusive, neglectful and alcoholic family background. This "collateral" background information (i.e., information from sources other than Petitioner), none of which was obtained or provided to mental health experts by trial counsel, provides numerous "red flags" indicating the need for brain damage testing and supports the testing results and the conclusion that Petitioner's organic brain damage is longstanding and dates back, at least, to early childhood. *Id.* at 53-55.

83. Petitioner's school records, *see supra,* are significant. His IQ scores, which were consistently in the mentally retarded range, *Id.* at 41-42; his achievement test scores, which were "very significantly below what he should have achieved at that time," *Id.*; and his placement in special education, *Id.* at 44-45, are all warning signs for the presence of organic brain damage, support Dr. Armstrong's test findings of brain damage, and indicate that the deficits revealed by Dr. Armstrong's testing were present from childhood or even in utero, *Id.* at 44, 79.

84. The WRAT and MMPI test scores in Petitioner's court and DOC records, *see supra,* are also significant. The DOC test results are consistent with Dr. Armstrong's test

scores, and the "overall picture" created by these scores is of "learning disability or retardation." *Id.* at 47. These scores in the DOC records, like the school records, "raise red flags" for organic brain damage and learning disability, "red flags" that would demand further exploration by mental health professional. *Id.* at 48.

85. The medical records showing that Petitioner suffered from diarrhea and a fever of over 105 degrees when he was two years old, *see supra,* are also significant, and are consistent with the type of physical trauma that can cause brain damage in the developing child. *Id.* at 48-49.

86. The descriptions of the neglectful, abusive and alcoholic home in which Petitioner was born and raised, *see supra,* are also clinically significant. Such collateral information about Petitioner's background is especially important because Petitioner remembers very little about his childhood, except that he was always called a "dummy." *Id.* at 27. The mother's "drinking during pregnancy is very dangerous to the fetus," "[o]ften causes mental retardation," and is consistent with the conclusion that Petitioner had brain damage from birth. *Id.* at 43-45, 50. The violence Petitioner suffered as a child is also consistent with and a warning sign for brain damage, since such abuse is "a potential origin for the organicity." *Id.* at 51. Indeed, childhood blows to the head "cause a very high rate of brain injury." *Id.* at 50-51.[8] Even apart from the organic damage that abuse causes, "[t]hat kind of

[8] Petitioner has "had a few times that he's had serious blows to the head." Armstrong Deposition at 51. One significant incident occurred when he was twelve years old, was hit with a large rock thrown from a cliff, and lost consciousness. *Id.* at 51-52.

behavior toward a child permanently injures their concept of themselves and permanently detracts from their ability to resolve problems in the future and leads to . . . depression." *Id.* at 51.

87. Petitioner's own alcoholism is also significant. He began drinking at age fifteen, and by age seventeen he was binge drinking and passing out. *Id.* at 55. Some of his deficits are "consistent with brain injury due to alcohol," and alcohol exacerbates the deficits caused by his pre-existing organic brain damage. *Id.* at 57.

88. Dr. Armstrong explained that the neuropsychological testing and evaluation she performed was widely available and used at the time of Petitioner's trial and capital sentencing proceedings. *Id.* at 31, 66. The jury, however, did not hear any of this evidence, because counsel did not obtain the school, hospital, court and prison records that were "red flags" for Petitioner's organic brain damage and did not request brain damage (neuropsychological) testing be done in order to develop mental health mitigating evidence.

89. **Dr. Barry Crown** is a psychologist and neuropsychologist and a specialist in evaluating child abuse and its effects. Deposition of Barry Crown, Ph.D., at 3, 4, 6, 65 (April 2, 1996). He has testified for prosecution and defense in numerous criminal cases, and has been appointed as a court expert, in state and federal court. *Id.* at 5, 131. At the request of post-conviction counsel, Dr. Crown met with and interviewed Petitioner and administered to him a battery of neuropsychological tests. *Id.* at 12, 15, 70-71. He also reviewed Petitioner's school, medical, and prior court records; DOC mental health and medical records;

trial testimony and documents; information from Petitioner's family and numerous other documents. *Id.* at 7-8.

90. Dr. Crown's testing and evaluation show that Petitioner suffers, and suffered at the time of the offense, from organic brain damage. Dr. Crown's testing shows that the frontal lobes of Petitioner's brain are damaged. *Id.* at 23. "The frontal lobes of the brain are where executive functions are organized and monitored"; they are "the site of reasoning and judgment and conceptual flexibility." *Id.* at 23-24. Thus, there is physical damage to those parts of Petitioner's brain "that control our generalized behavior; our reasoning, our judgment, our attempts to make sense out of the things around us, our ability to accept the long-term consequences of immediate behavior and also to monitor and assess our own conduct." *Id.* at 24. Because of his brain damage, Petitioner is significantly impaired in these important areas. *Id.*

91. Dr. Crown explained that "there are no indications of malingering or faking" on the testing, and "[t]he research literature indicates that even a Ph.D. trained psychologist cannot successfully fake a battery of neuropsychological tests." *Id.* at 30.

92. Petitioner's brain damage is "bilateral" – i.e., it "not only impinges on the dominant left language based hemisphere [of the brain] but also on the nondominant, nonlanguage based hemisphere." *Id.* at 21. "When there's a bilateral problem it means that both verbal and nonverbal information is having difficulty being transferred between the two hemispheres." *Id.* at 22. This damage thus "short circuits the [reasoning] process because he is unable to logically move through the sequences necessary to arrive at a reasoned response, so instead is most likely to exhibit

impulsive behavior and impulsive responsiveness." *Id.* at 22-23. Because Petitioner cannot process information properly, his brain damage also causes him to "engage in confabulation, which is the nonvoluntary filling in of missing information in order to arrive at something that makes sense to the person." *Id.* at 23.

93. Petitioner's brain damage has drastic, debilitating effects on his personality and ability to function. His brain damage impairs and undermines his judgment, reasoning, cognition, mental flexibility, impulse control, emotional lability, ability to understand and respond appropriately to his environment, ability to predict the consequences of behavior and ability to control his behavior. *Id.* at 12-14, 62. "[H]e has a great deal of difficulty figuring things out, making sense out of experience." *Id.* at 19. "[B]ecause of not having the ability to think things through, to reason," and because his brain "can't store information and then be able to retrieve it in a logical and consistent manner," he is "very likely to reach faulty conclusions, very likely to be pressured by others to reach conclusions and very likely to act impulsively." *Id.* at 19-20, 26-27. Petitioner is also learning disabled as a result of his brain damage. *Id.* at 31.

94. Dr. Crown explained that the problems caused by Petitioner's brain damage were especially debilitating because they were combined with other misfortunes, including his dysfunctional childhood and family background, alcoholism and related stress.

95. Petitioner was an abused and neglected child. This exacerbated the adverse impact of his organic brain deficits, "because there would be psychologically no trust, no acceptance, and difficulties with interpersonal interactions."

Id. at 53, 61. Petitioner's alcoholism also combined with his brain damage in a destructive way, because "alcohol [use] exacerbates the problems and the impairments" associated with brain damage – including impulsivity, lack of judgment and inability to judge future consequences. *Id.* at 52. Brain damage impairments are also exacerbated by stress, and Petitioner was under a great deal of stress at the time of the offense because he was trying to adjust to "outside" life after fourteen years in prison. *Id.* at 52-53. "[B]eing re-exposed to . . . the real world, rather than the limits of the confined world, takes a great deal of adjustment" for anyone. *Id.* at 53. It is especially stressful for a brain-damaged individual such as Petitioner, since he has "a great deal of difficulty figuring things out" and adjusting to new, changing and unstructured situations. *Id.*

96. In short, Petitioner's brain damage significantly impaired him and gave him very "limited reserve," "very little to fall back on." *Id.* at 12-13. When the deficits caused by his brain damage were combined with his alcoholism, his recent release from jail, and his dysfunctional childhood, they created a "snowballing effect, and as one stressor was placed on another, even any limited reserve would very rapidly diminish." *Id.* at 54.

97. Dr. Crown explained that his testing and evaluation of Petitioner, the nature of Petitioner's impairments, and Petitioner's history, show that Petitioner suffered from brain damage and its effects throughout his adult life. His brain damage dates back at least to childhood and quite possibly occurred in utero. *Id.* at 51, 60-61. Because of his brain damage and its effects, Petitioner suffered at the time of the offense from an extreme mental and emotional disturbance and was substantially impaired in his capacity to appreciate the criminality of conduct or to

conform his conduct to the requirements of law. *Id.* at 61-63, 132-33.

98. Dr. Crown also explained why the collateral background information from Petitioner's hospital, school, court and prison records and from his family members is significant to a mental health professional. This information, none of which was obtained by trial counsel or provided to the mental health experts who saw Petitioner at the time of trial, provides numerous signs of organic brain damage, supports Dr. Crown's testing results and is consistent with the conclusion that Petitioner's organic brain damage has plagued him throughout his life.

99. The IQ scores in Petitioner's records show "a great deal of consistency" and "place him within the bounds of mental retardation" *Id.* at 32. The possible causes of such low IQ scores include: "genetics, perinatal problems, neonatal problems, neural development problems, external trauma, exposure to disease entities, nutritional deficits at an early age," and an abusive or dysfunctional family life. *Id.* at 35-36. Thus, these low scores are "red flags" showing that further mental health evaluation needed to be done, including testing "for an organic impairment." *Id.* at 59.

100. Petitioner's placement in special education classes is also significant, especially because

> he was placed in special education beginning at what must have been the fourth grade level. In terms of brain development, that's the time of the secondary development of the frontal lobe.

> So he was exhibiting . . . the precursors to frontal lobe deficits even by school measures at that time, which would have been [19]57, [19]58.

Id. at 38.

101. In addition to their significance as signs of organic brain dysfunction, the low IQ scores and special education assignment are also psychologically significant "because the child is clearly identified as being different," thus impairing his self-esteem. *Id.* at 58.

102. Dr. Crown explained that Petitioner's abusive and dysfunctional childhood environment are also psychologically and neuropsychologically significant. Petitioner was subjected to both physical and emotional abuse. Such a traumatic childhood environment has long-term adverse effects:

> The most salient effect that it [child abuse and neglect] has is the introduction of mistrust, the loss of trust, . . . faulty construction, conceptualization of what life is like.
>
> * * *
>
> [T]here is no self-esteem. Self-esteem is eliminated along with trust, and there's also a general feeling of hopelessness in the situation, in that there will be no change. There's both hopelessness and helplessness.
>
> * * *
>
> Having been exposed to a faulty world with faulty expectations and having been abused in situations where others would not have, that creates a faulty image of what life is supposed to be like.

> As a result, when challenged by things that don't fit into that simple mold, impulsive behavior is likely.

Id. at 55-56.

103. An abused child becomes impaired in his ability to understand cause and effect "because the rules are not always consistent." *Id.* at 58. The abuse makes him impulsive because he never learns how he is supposed to behave, and there is no way for him to predict which behaviors will be punished and which will bring rewards. *Id.* at 59.

104. The verbal and emotional abuse that Petitioner suffered, such as always being called "dummy" and being put down by his father, is also

> significant because it addresses the issue of self-esteem. Having been told countless times over and over again that you are no good, it creates a self-fulfilling [prophecy] in which the person sees themselves as being that way and knows of no other way to act.

Id. at 57. The physical and psychological abuse become a "vicious cycle" in which one reinforces the other. *Id.* at 57.

105. Dr. Crown explained that the testing information in Petitioner's school and prior court and prison records is consistent with the abuse and neglect he suffered as a child. "[C]hildren from an abusive upbringing very typically score low" on IQ tests, and placement in special education is also consistent with suffering abuse, *Id.* at 128 – it is "more likely and probable that someone going through an abusive situation would not be able to keep up with his age mate peers in schooling [and] wind

up in special education." *Id.* at 37-38. Petitioner's organic brain damage is also consistent with the physical trauma he experienced as a child. Taken together, the historical testing (reflected in Petitioner's school records and prison records), Petitioner's placement in special education, and Dr. Crown's testing and evaluation, all support the conclusion that Petitioner had an abusive childhood. *Id.* at 58. The family's descriptions confirm it. *Id.*

106. The parents' abuse of alcohol was also a significant feature of Petitioner's childhood and development. Parental alcohol abuse is significant because it is associated with violence against the children and because it makes it "very clear where [Mr. Rompilla's own alcoholic] behavior was learned." *Id.* at 46. Moreover, the mother's continuing abuse of alcohol during her pregnancies suggests possible in utero development of Petitioner's brain damage – fetal alcohol syndrome:

> Children who manifest the syndrome tend to have borderline to full level mentally retarded Wechsler scores and performance. They tend to have neuropsychological impairment which are bilateral. They tend to have a great deal of difficulty in dealing with reasoning and judgment. They tend to be impulsive and they also tend to have certain facial characteristics in terms of wide-set eyes.

Id. at 46-47. Petitioner meets all of these criteria. *Id.*

107. Petitioner's childhood history also suggests several other early causes of his organic impairments. The high fever and diarrhea that Petitioner suffered at age 2, as reflected in his hospital records, are significant. *Id.* at 38-39:

> The diarrhea causing the hospitalization would . . . have affected his . . . electrolyte balance, . . . [which] is what controls the operation of the nervous system, particularly within the brain. . . . [I]t appears that . . . nutritional marasmus would have taken place. In addition the fever going up to 105 at the same time would also have an effect on that developing nervous system. We know that children who experience high fevers very well may develop problems concerning brain function and behavior.

Id. at 39. It is especially significant that this trauma occurred at age two, since under the age of 3 is "the most vulnerable period." *Id.* at 40. These records are thus consistent with Petitioner's brain damage, since they provide a possible explanation for his poor IQ performance and his impairments on the neuropsychological testing. *Id.* at 40, 48.

108. Petitioner also has a history of head injury that is consistent with his organic brain damage. He "has a history of loss of consciousness. He has a history of a left frontal injury. In fact, there's a scar in the left frontal area of his head." *Id.* at 48. This injury over Petitioner's left brow is "reflective of a left frontal-orbital syndrome," consistent with his brain damage. *Id.* at 49.[9]

109. The test results in Petitioner's prior court and prison records, *see supra* are also psychologically significant. The WRAT scores in the prison records show "significant

[9] November 8, 1988 DOC records indicate that Petitioner had this scar at the time of trial and sentencing. Crown Deposition at 49, 51. Trial co-counsel Maria Dantos recalled seeing the scar at that time. NT 3/28/96 at 146, 148.

impairment," are "consistent with the earlier [school] IQ scores and with the neuropsychological testing," *Id.* at 41, and are consistent with learning disability and organic brain damage, *Id.* at 43-44. The MMPI scores show "personality deficits." *Id.* at 42. These types of scores are present in patients who are impulsive, live socially isolated lives and are schizoid – i.e., they have "difficulty in making sense out of reality." *Id.* at 42-43. All of these features are present in Petitioner, "particularly the impulsivity and the . . . difficulty in making sense out of reality." *Id.* The MMPI scores "reflect[] lack of trust, which developed very early," and show that Petitioner has "a great deal of difficulty figuring things out leading to faulty conclusions and prematurely being suspicious." *Id.* at 43. These MMPI scores are consistent with Petitioner having suffered child abuse. *Id.* at 128. They are *not* consistent with anti-social personality disorder. *Id.*

110. In short, Petitioner's medical, school, prison and court records, his dysfunctional family background and his history of head trauma are psychologically and neuropsychologically significant, and are important information that a mental health evaluator would have wanted to have at the time of the trial and sentencing proceedings in 1988. *Id.* at 131. The full development and presentation of such collateral information is especially important here because Petitioner's brain damage creates "difficulties with his reasoning and judgment," and makes him "likely to confabulate because of his confusion, and as a result everything that he says indeed may not be consistent." *Id.* at 82. These collateral data, none of which were obtained by trial counsel, are "red flags for an organic impairment," *Id.* at 59, and, had they been presented to mental health experts in 1988, would have demanded that complete

neuropsychological testing be done. *Id.* at 130, 137. "There's no question about it." *Id.* at 60.

111. Dr. Crown explained that all of his testing and evaluation techniques were available from qualified mental health professionals at the time of the capital trial and sentencing proceedings. *Id.* at 88. Child abuse and organic brain damage were well known areas for mitigation in 1988. *Id.* at 130. The tests Dr. Crown administered were available in 1988, and the adverse effects of brain damage were well known. *Id.* at 15, 93. The debilitating effects of child abuse were also long-recognized at the time of the trial court proceedings. *Id.* at 55.

112. The jury, however, never heard any of this evidence, because counsel failed to investigate, obtain and present to the mental health experts the records showing Petitioner's impairments, failed to have brain damage testing performed, and failed to investigate, prepare and present the evidence of Petitioner's dysfunctional family background and alcoholism.

113. **Dr. Gerald R. Cooke** is a psychologist. Deposition of Gerald Cooke, Ph.D., at 4 (April 3, 1996). He was retained by trial counsel and saw Petitioner in 1988. *Id.* at 6. Dr. Cooke did *not* do any neuropsychological (brain damage) testing of Mr. Rompilla. *Id.* at 6-7.

114. Dr. Cooke did not have Petitioner's school records or prior prison/court records when he saw Petitioner. *Id.* at 8, 13. The records were never provided to him by trial counsel. Dr. Cooke testified that the test scores contained in these records are highly significant to a mental health evaluation and *would have been important for him to have at the time he saw Petitioner*. If counsel had provided Dr. Cooke these records, *he would have done*

neuropsychological testing and would have made further inquiries into Petitioner's background and mental health. *Id.* at 8-11, 21, 26.

115. Dr. Cooke explained that the IQ scores in Petitioner's records are very significant because they are in "the retarded to borderline range of intellectual functioning." *Id.* at 7. These low IQ scores, had they been provided to Dr. Cooke, "*would have been a red flag* and that *would have been something I would have pursued.*" *Id.* at 21. One of the most prominent problems for which these low scores are a "red flag" is organic brain damage. *Id.* at 8-11. Therefore, if counsel had provided Dr. Cooke with these records, Dr. Cooke *would have tested Petitioner for brain damage* (as Dr. Armstrong and Dr. Crown did). *Id.* at 8-11. Petitioner's placement in special education is also a red flag that would have demanded further inquiry by Dr. Cooke into organic brain damage, if the records had been provided by counsel. *Id.* at 26.

116. Moreover, the low IQ scores in the records would have prompted Dr. Cooke to look further into Petitioner's background and developmental history. As Dr. Cooke explained, when, as here, the low IQ scores were from a child:

> you would look at the family situation, whether or not it was an abusive situation, a dysfunctional situation. You'd want to see more about . . . the child's adjustment in school.
>
> * * *
>
> You'd also get historical information: . . . including, was the pregnancy difficult? Were there any abnormalities? things of that nature.

Id. at 10. Because counsel did not provide these records to Dr. Cooke, the doctor did not undertake any of this inquiry into organic brain damage, childhood abuse and other problems.

117. Dr. Cooke explained that the test scores in Petitioner's prison records (and included in his prior court files) are also significant and would have been important for him to have at the time that he saw Petitioner in 1988. The WRAT scores in these records show that Petitioner was developmentally delayed in spelling and arithmetic, and are consistent with his suffering from a learning disability. *Id.* at 12-13. Learning disability is often due to, and a function of, organic brain damage. *Id.* at 13. Therefore, if Dr. Cooke had been presented with these WRAT scores when he saw Petitioner in 1988, he would "definitely" have considered brain damage as a potential cause for those scores, and would have administered brain damage testing. *Id.* Because learning disabilities can also be caused by child abuse, the doctor would also have looked further into that area if he had been provided these scores. *Id.* at 13-14. Given the significance of these prison records, if he had been provided them by counsel he "would have gone back to the attorneys" and asked for more information about Petitioner's developmental history – "'Is this guy a special education?' 'Did he have developmental problems?' and so on." *Id.* at 22. But counsel did not provide this information to the doctor.

118. Dr. Cooke explained that organic brain damage and child abuse would have been important avenues to pursue for purposes of the capital sentencing proceedings. Brain damage "is a mental defect that *certainly qualifies as a mitigating factor.*" *Id.* at 29. The fact that Petitioner suffered from child abuse is also important mitigating

evidence. Child abuse can cause long-lasting emotional disturbance, *Id.* at 30, and it "often helps to explain, certainly, to a jury how the person got to where they are, why they are the types of people they are," *Id.* at 29. However, because the school and prior prison/court records were never obtained by counsel or provided to the doctor, the doctor was unaware at the time he saw Mr. Rompilla of the "red flags" contained in those records that would have prompted an exploration and development of this mitigating evidence.

119. **Dr. Robert Sadoff** is a psychiatrist. Deposition of Robert Sadoff, M.D., at 4 (April 23, 1996). He met with Petitioner in 1988 at defense counsel's request. *Id.* at 5. When he met with Petitioner, Dr. Sadoff did not have the information from the hospital, school, prison and court records, and did not know of Petitioner's traumatic childhood or history of mental impairments, because counsel did not provide him with any of the information.

120. Dr. Sadoff testified that collateral background information, of the type contained in the school, medical and prior prison/court records and the family statements, is very important for mental health experts to have in a forensic case. *Id.* at 30. The expert needs such collateral information – i.e., information from sources other than the defendant – because a defendant who is the subject of a forensic examination is not a reliable source of information, including information regarding child abuse and symptoms of mental illness. *Id.* at 31.

> [I]n forensic work it isn't the same as a person coming to me because he's hurting, he's in emotional pain and he wants relief of that pain.

> He comes to me because he's involved in some difficulty, civil or criminal. And the veracity, validity, credibility, whatever word you use, is not of the same caliber as if he were coming for treatment. So it's very important for me to have collateral information that would either substantiate or negate what he tells me.

Id. at 30-31. Counsel, however, did not provide the doctor with this information.

121. The information contained in Petitioner's school, medical, prison and court records is the type of collateral information that it is important for a mental health expert to have when conducting a forensic examination. *Id.* at 34. Such information is especially important in a capital case, where it is essential to "get as much information as we can." *Id.* at 35. These records, if counsel had provided them to the doctor, would have been considered by him as very important in a forensic mental health evaluation. *Id.* at 10, 28.

122. This information, if trial counsel had provided it to Dr. Sadoff, would have had a profound effect on the doctor's evaluation:

> First as a forensic psychiatrist having had that information and doing my psychiatric examination, I might have examined different questions. I might have probed in the area of reasons why he might have [scored so poorly]. Is it genetic? Did he ever have an accident or a fall that would have hit his head?
>
> * * *
>
> Any toxic substances, high fevers that might have caused him to have some brain dysfunction?

> And *I would have recommended a battery of psychological and neuropsychological testing* to probe the cause, if we could find it, of these low IQ scores.
>
> And I would also have the psychologist do the testing contemporaneously to compare these scores. . . .

Sadoff Deposition at 10.[10]

123. Doctor Sadoff explained that Petitioner's records contain many warning signs for organic brain damage, requiring further evaluation and testing. The mentally retarded scores in the school IQ testing are important as a "building block" in a psychological evaluation – they are a red flag for brain damage. *Id.* at 8, 37. The hospital records, showing that Petitioner suffered from a very high fever and diarrhea at age two, are also very significant – "when children get high fevers when they are a year or so old, the fever as a youngster might effect his brain . . . that would leave him scarred or mentally challenged for the rest of his life." *Id.* at 15. Petitioner's fever of over 105 degrees is certainly high enough to cause such long-lasting effects. *Id.* at 16. Thus, the hospital records would have also been a red flag for

[10] Dr. Sadoff explained that neuropsychological testing "probes to see whether there is any brain damage." Sadoff Deposition at 12. Dr. Sadoff has no expertise in or familiarity with psychological or neuropsychological testing. Instead, he relies upon other experts to do such testing. *Id.* at 13-15. Dr. Sadoff did not recall working with or relying on Dr. Cooke in this case. *Id.* at 9, 30. However, it is Dr. Sadoff's experience, from working with Dr. Cooke, that if Dr. Cooke had known of these school IQ scores he would have done neuropsychological testing. *Id.* at 9. (Dr. Cooke himself so testified. *See supra*.)

organic brain damage and would have indicated the need for neuropsychological testing. *Id.*

124. Dr. Sadoff explained that the areas for which the records provide evidence or warning signs, including brain damage, mental retardation and poor school performance, are relevant to mitigation, and were so at the time of the trial and sentencing proceedings. *Id.* at 27-28.[11] The neuropsychological and psychological testing that was needed to follow up on the "red flags" contained in the records were also available at that time. *Id.* at 28. However, none of this mitigation was presented because counsel did not provide him with this important collateral information.

125. **Dr. Paul K. Gross** is a psychiatrist. Deposition of Paul K. Gross, M.D., at 3 (April 1, 1996). He saw Petitioner in 1988, at trial counsels' request. *Id.* Dr. Gross has never prepared for or testified at the penalty phase of capital case. *Id.* at 6. In this case, Dr. Gross believed that his role was limited solely to looking for possible guilt-phase mental health defenses such as insanity. *Id.* at 44. Dr. Gross explained that trial counsel did not ask him to determine if Petitioner's capacity to conform his conduct to the requirements of law was substantially impaired, *id.* at 34-35; did not ask him to look into social and development issues, *id.* at 35; and did not ask him to look into the existence or absence of any mitigating factors at all, *id.* at 35, 44. In short, Dr. Gross was *not looking for mitigation* when he met with Petitioner in 1988.

[11] Dr. Sadoff so testified despite possessing an overly narrow view of what constitutes mitigating evidence, as described in more detail below.

126. When Dr. Gross saw Petitioner in 1988, his evaluation was limited to a "standard MSE [Mental Status Exam]," that relied solely on information provided by Petitioner. *Id.* at 40-41. Dr. Gross testified that one role of mental health expert is gathering and compiling a history of the defendant for mitigation purposes. He did not do this, however, because *he was not evaluating Petitioner for mitigation purposes. Id.* at 29.

127. Dr. Gross testified that psychological testing is an important part of a professionally adequate mental health evaluation. *Id.* at 17. ("you can pick up, certainly, things in testing which you're not going to pick up in a clinical evaluation"); *id.* ("[N]o matter how thorough the psychiatric examination itself may be, there are aspects of functioning that should be conducted by experts in other disciplines. For example, the results of routine psychological tests are invaluable. Moreover, more specialized neuropsychological tests . . . often reveal organic deficits not elicited in either the psychiatric or the routine psychological examination."). However, Dr. Gross did not have any testing. *Id.* at 18.

128. Dr. Gross also lacked any collateral information – i.e., information from sources other than Petitioner – about Petitioner's background and history. Trial counsel did not provide Dr. Gross with any school records, prior prison/court records, records from prior offenses, or any other records, and did not provide him any background information about Petitioner's family life or childhood. *Id.* at 24. Dr. Gross testified that such records and background information are significant to a mental health evaluation, and that if he had been asked to look into mitigation the records would have been useful to him. *Id.* at 44.

129. Dr. Gross explained that Petitioner's school records are significant to a mental health evaluator. The test scores in Petitioner's school records, including his mentally-retarded range IQ scores, his placement in special education, and his very poor performance on achievement tests, are all significant from a mental health standpoint. They are consistent with, and red flags for, child abuse and organic brain damage. *Id.* at 22-23, 31. These records would be important to any mental health professional evaluating Petitioner. *Id.* at 25-26, 30-31.

130. Dr. Gross testified that test scores in Petitioner's prior prison and court records are also significant from a mental health standpoint. The very low WRAT scores in these records, showing that Petitioner was in the fourth percentile in spelling and the third percentile in arithmetic, would be useful to a mental health evaluator. *Id.* at 33. The MMPI scores in the records are also highly significant to an evaluation of Petitioner's mental health. *Id.* at 45. They reflect serious psychological deficiencies in Mr. Rompilla: "This is an abnormal MMPI." *Id.* at 46.

131. Dr. Gross testified that the prevalence of alcohol abuse in Petitioner's family is also significant and that "alcohol in anybody in the immediate family would have been important to know" when he saw Petitioner. *Id.* at 44-45. Counsel, however, did not provide the doctor with any information about the alcoholism in Petitioner's family or Petitioner's own alcohol abuse.

132. While trial counsel failed to provide Dr. Gross any information about the alcoholism of Petitioner and his family, Dr. Gross's report to trial counsel (Exhibit 6) is replete with information that should have caused counsel to investigate Petitioner's alcohol abuse, and *explicitly*

suggests that counsel investigate Petitioner's reaction to alcohol, and the possibility of alcoholic blackout. The report states:

> – on the day of the offense Petitioner "left work at lunch time and went to visit *several local bars.* He returned to his house at dinner time and then went out after supper again, *to some local taverns*" where he stayed "until closing time at 2:00 a.m.";
>
> – "He *does not recall the exact amount of alcohol that he had*";
>
> – "He *does admit to drinking,* although not a great amount *which was a parole violation.*";
>
> – He "does not consider himself an alcoholic. *He did,* however, *attend AA* [*Alcoholics Anonymous*] *while he was in prison.*"
>
> – "The possibility does remain . . . that *Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior* although he himself strongly denies this."
>
> – "*My recommendation is that this area should be further evaluated* before any definitive conclusions are drawn."

133. Dr. Gross told counsel that Petitioner's problems with alcohol needed further investigation; and described the tendency of alcoholics to be in denial about their drinking problems. Gross Deposition at 6-7. Dr. Gross also explained that the long term effects of alcohol

abuse include organic brain damage, and that people with brain damage are more prone to blackouts that others. *Id.* at 8. Therefore, the report's suggestion to counsel was meant to include exploring possible organic brain damage. *Id.* Dr. Gross testified that he had no further involvement or contact with counsel after he sent out his report. *Id.* at 9.

134. Dr. Gross, in the report he provided to trial counsel, also noted Petitioner's history of antisocial behavior. *Id.* Dr. Gross testified that such a history is a strong indicator that Petitioner suffered from child abuse. The doctor testified that antisocial behavior "is caused by real, faulty dysfunctional family relationships." *Id.* at 19; *see also id.* at 10-11 ("a consistent finding in the histories of extremely violent recidivists is a history of being severely physically abused"); *id.* at 14-15 (abusive upbringing is "commonly thought of and agreed to" cause antisocial behavior); *id.* at 14-15 (antisocial behavior "has to do with the way they were raised by their parents"); *id.* at 19 ("in general, [antisocial behaviors] are due to childhood experience in a very unhealthy family, and that causes the antisocial behavior").

135. This strong causal link between an abusive childhood and later antisocial behavior arises because

> the experience of such aggression [in childhood] seems to have lasting effects on the victims. There are several ways in which being the object of such violence contributes to the development of antisocial behavior.
>
> First, it provides a model for behavior. Second, it frequently results in injury to the child's CNS [central nervous system], thereby impairing the child's ability to control impulses, think logically,

> functional [sic] adequately at school, and behave in socially appropriate ways. Finally, it engenders rage in the victimized child, which frequently seems to be displaced onto teachers, peers, and even strangers.

Gross Deposition at 12.

136. Accordingly, Dr. Gross explained, when someone's history has strong antisocial elements, one should suspect that the person had an abusive childhood, and should look carefully into that possibility. *Id.* at 12-13.[12] Dr. Gross testified that the subject of a forensic mental health examination is "usually reluctant to admit that their parents have hurt them physically." *Id.* at 16. Therefore, reliable information about abuse cannot be obtained from the subject, and "family histories . . . are essential." *Id.* Dr. Gross did not speak to any of Petitioner's family members, and counsel did not provide him with any information from the family or about the family situation. *Id.* at 17.

137. Dr. Gross explained that childhood abuse often causes central nervous system deficits and organic brain damage: "If you suspect that the person has been physically abused," "you should look into" organic brain damage. *id.* at 20; *see also id.* at 13 ("Many [abused children] have identifiable cognitive impairments, manifested by wide discrepancies on subtests of intelligence scales, poor short-term memory, and impaired reasoning on mental status examination. Most have histories of school problems, learning disability, especially reading problems, and

[12] Surprisingly, given his knowledge of the link between childhood abuse and later antisocial behavior, Dr. Gross was *not aware* that an abusive childhood can be mitigating at the penalty phase of a capital case. Gross Deposition at 28.

altercations with peers and teachers."). He explained that brain damage is mitigating at capital sentencing because it impairs and adversely affects judgment, reasoning, cognition, impulse control and emotional lability, and impairs the capacity to conform conduct to the requirements of law. *Id.* at 21-22, 28-30. Dr. Gross had no testing.

138. **Maria Dantos** was co-counsel, along with Frederick Charles, at trial. This was her first capital case and her first homicide trial. NT 3/28/96 at 18-19. Her role was to "handle the penalty phase" and to "assist" Mr. Charles at the guilt phase of the trial. *Id.* at 14. Ms. Dantos contacted the mental health professionals in this case. *Id.* at 19-20. Ms. Dantos is no longer a defense lawyer; she has been a prosecutor in the Lehigh County District Attorney's office since September of 1989. *Id.* at 12.

139. Ms. Dantos testified that the defense did not have any tactical or strategic reasons for failing to present the evidence of Petitioner's traumatic childhood, poor school performance, mental retardation, impaired mental health and organic brain damage. She explained that all of this evidence is important for a capital sentencing jury to hear, and would have been presented by the defense if they had been aware of it.

140. Ms. Dantos testified that trial counsel did not present Petitioner's school records to the jury or mental health experts because counsel failed to investigate Petitioner's school performance – counsel did not seek or obtain Petitioner's school records. *Id.* at 28, 30, 150. Ms. Dantos testified that counsel did not have any strategic or tactical reason for not obtaining the school records or presenting them to the jury and mental health experts. *Id.* at 49. To the contrary, when Ms. Dantos did see Petitioner's

school records for the first time during the post-conviction proceedings, she testified that these records, which show Petitioner's mentally-retarded IQ scores; his substantially impaired abilities in reading, spelling and arithmetic; and his placement in special education classes, are the type of records that she would want to present at capital sentencing and that should be shown to mental health experts in preparation for the capital sentencing proceedings. *Id.* at 27-28, 31-36, 151.

141. Ms. Dantos testified that trial counsel never gathered any of Petitioner's medical records, despite her recognition that Petitioner's medical history could be important to an evaluation of his mental health. *Id.* at 40. She saw Petitioner's hospital records for the first time during these PCRA proceedings – records showing that Petitioner suffered from high fever and diarrhea when he was two years old. *Id.* at 41-42. Ms. Dantos testified that the defense did not have any tactical or strategic reasons for failing to obtain these medical records or provide them to experts. *Id.* at 44, 49. She testified that, although she was not sure what mental health significance these records might have, she would have given the records to an expert to determine their significance. *Id.* at 45.

142. Ms. Dantos testified that trial counsel never obtained any of Petitioner's prior prison and court records, including the records from the prior convictions that were used in aggravation in the capital sentencing proceeding. *Id.* at 60-62; *see also* NT 11/1/88 at 31 (when co-counsel Charles complained during trial that he did not have information about the prior convictions, the prosecutor responded: "*it's a public record, Fred, you could have gone over lunch and looked at it just like I did*"). Therefore, Ms. Dantos saw the DOC records contained in the Common

Pleas Court file (and the psychological tests included therein, reflecting Petitioner's mental impairments) for the first time during these PCRA proceedings. NT 3/28/96 at 62.

143. When Ms. Dantos was shown these prison/court records, she testified that information they contained was important and was the type of information that she would want to provide to a mental health expert. In particular, she testified that the achievement test scores (showing Petitioner's substantially impaired abilities) and the MMPI results (showing serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales) were significant and should have been provided to the experts at the time of the trial and capital sentencing proceedings. *Id.* at 63-66.

144. Ms. Dantos testified that information regarding Petitioner's traumatic childhood – e.g., the parental neglect and abuse and bizarre treatment of Petitioner and his siblings; the fact that Petitioner's brother was in reform school from an early age; alcoholism in the parents and the family; the mother's drinking while she was pregnant with Petitioner; and Petitioner's head injury – were important and should have been presented to the mental health experts and the jury. *Id.* at 109-15.

145. Ms. Dantos testified that Petitioner's alcoholism and long history of severe drinking problems was the type of evidence that should have been presented to the sentencing jury and the mental health experts. *Id.* at 54. Petitioner told Ms. Dantos that he had been drinking on the night of the offense. *Id.* at 126-27. Yet, Ms. Dantos did not recognize or investigate the presence of alcohol-related mitigation. *Id.* at 129.

146. At the time of the original trial court proceedings, Ms. Dantos noticed the large scars on Mr. Rompilla's forehead (resulting from childhood head injury), but she did not ask Mr. Rompilla or his family members about the scarring or what caused it. *Id.* at 146, 148.

147. Ms. Dantos testified that trial counsel did not ask the mental health experts to do any neurological or neuropsychological testing for brain damage. *Id.* at 58. Instead, she recalled that counsel asked the experts to look only into Mr. Rompilla's "mental state at the time of the commission of the offense" (not a mitigation evaluation, which looks to an individual's life history and to mental health issues other than guilt-phase insanity). *Id.* at 24, 67-68.

148. **Frederick Charles** was co-counsel, along with Maria Dantos, at Petitioner's trial. This was his first capital case that went to a jury. NT 3/29/96 at 4. Mr. Charles was primarily responsible for the guilt phase, while Ms. Dantos was primarily responsible for the penalty phase. NT 3/28/96 at 210-11.

149. Mr. Charles explained that his ability to adequately investigate this case was impaired by the fact that his office (the Lehigh County Public Defender) had only two investigators for approximately two thousand cases. NT 3/29/96 at 13. Mr. Charles did not seek out, obtain or read Petitioner's school, medical, prison, court, or any other records. He testified that he would never do so in any capital case, as a general rule. *Id.* at 17, 55, 71-72. Mr. Charles also testified that he does not look for signs, such as facial scars, that a capital defendant had suffered head injuries, and he did not recall if he had noticed Mr. Rompilla's scars. *Id.* at 81-82.

150. Even though he did not here (and generally does not) pursue prior records to investigate potential mitigating evidence, Mr. Charles acknowledged that brain damage evidence such as that presented by post-conviction counsel is important because it is mitigating. *Id.* at 48-49. At the time of the original trial court proceedings, Mr. Charles "expected" that Dr. Cooke would "test to determine if there was any brain damage." *Id.* at 43. However, he did *not* ask Dr. Cooke to do such testing, and he never asked any of the doctors if brain damage testing was done. He simply assumed that it would be done, although he never asked for it. *Id.* at 45, 47. Mr. Charles was also aware that alcohol can cause brain damage, but he never asked Mr. Rompilla if he had a drinking problem. *Id.* at 93-94.

151. Mr. Charles testified that evidence of mental retardation would also be important to present in a capital case. *Id.* at 29. However, he believed that counsel had no duty to seek out such evidence, such as that presented in Mr. Rompilla's school records. *Id.* at 65. When post-conviction counsel showed Mr. Charles Petitioner's school records, he acknowledged that he never obtained them, did not read them, and did not provide them to the experts or ask the experts whether they included significant information; he also said that he did not know the significance of the mentally retarded IQ scores and special education placements included in those records. *Id.* at 63. Similarly, Mr. Charles said he did not know the significance of Mr. Rompilla's extremely low achievement scores and high schizophrenia score, on tests contained in his prison/court records. *Id.* at 67, 71. Mr. Charles never obtained these records, did not read them, and did not provide them to

the experts or ask the experts whether they included significant information.

152. **Albert Nelthropp** was appointed in 1988 to represent Mr. Rompilla on direct appeal. NT 3/28/96 at 160. It was Mr. Nelthropp's first homicide case. *Id.* at 163. Mr. Nelthropp never visited Petitioner and never spoke to him about the case. *Id.* at 161. He failed to file a timely notice of appeal. *Id.* at 165. He testified that he "couldn't make it [this case] my main priority" because he had to make a living, and was not able to do "as much as I wanted" because of his heavy caseload. *Id.* at 177, 189. Pennsylvania Supreme Court Prothonotary Charles Johns complained to Nelthropp about the quality of his representation on direct appeal. *Id.* at 188.

153. **Dr. Frank M. Dattilio** is a psychologist. Deposition of Frank M. Dattilio, M.D., at 4 (May 7, 1996). The Commonwealth retained and called Dr. Dattilio as a "rebuttal" witness in the post-conviction proceedings. Dr. Dattilio, however, *never met with, examined or tested Petitioner in any way*. *Id.* at 7, 53. He also acknowledged that he is not a neuropsychologist. *Id.* at 11-13.

154. Because Dr. Dattilio is, by his own admission, *not* an expert in neuropsychology, Petitioner's counsel objected to his testimony on neuropsychological matters. *Id.* at 11-13. Petitioner's counsel also objected to Dr. Dattilio's testimony as being inadmissable under *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771 (1995), since the doctor has never actually seen or met with Petitioner. Dattilio Deposition at 3. *See Buehl,* 658 A.2d at 781 (testimony of an expert who does not actually see and evaluate the defendant is unreliable and inadmissable). Dr Dattilio himself testified that face-to-face evaluation and

interview is "imperative" for an adequate neuropsychological evaluation. Dattilio Deposition at 53. Yet he testified here without ever performing such an adequate evaluation. For all of these reasons, Petitioner's counsel objected to Dr. Dattilio's testimony in the PCRA trial court, *see* Dattilio Deposition at 3, 11-13, and Petitioner's counsel renewed the objection on appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court did not rule on the objections.

155. Nonetheless, Dr. Dattilio's "rebuttal" testimony actually *supports* Petitioner and shows that Petitioner is entitled to relief. Although Dr. Dattilio was called by the Commonwealth as a "rebuttal" witness, he substantially confirmed the testimony of Dr. Crown and Dr. Armstrong regarding Petitioner's brain damage and abusive childhood and their effects on Petitioner.

156. Dr. Dattilio testified that Dr. Armstrong and Dr. Crown – the neuropsychologists who evaluated Petitioner for post-conviction proceedings – are well-qualified, *id.* at 62-63; that the neuropsychological tests they administered are "quite accurate and are often used," *id.* at 54; that their testing was consistent, "valid and reliable," and "clearly . . . accurate," *id.* at 17, 54, 60, 111; that Petitioner was not malingering on the tests, *id.* at 111; and that the testing shows that Petitioner *does suffer from organic brain damage, id.* at 55-60.

157. Dr. Dattilio described some of the debilitating, mitigating effects of Petitioner's organic brain damage. He explained that such organic brain damage adversely affects and impairs personality, ability to function, emotional lability, impulsivity, cognition, reasoning, judgment,

ability to predict future consequences, and ability to control behavior. *Id.* at 50-51, 97.

158. Dr. Dattilio testified that Petitioner's organic brain damage constitutes an extreme emotional disturbance, may have prevented Petitioner from appreciating the criminality of his conduct or conforming his conduct to the requirements of law, and is otherwise mitigating. *Id.* at 99, 118-19.

159. Dr. Dattilio testified that the background information about Petitioner, including his school, prison and court records and family accounts of Petitioner's dysfunctional childhood, are all consistent with Petitioner's brain damage being long-standing – dating back at least to childhood. Dr. Dattilio noted that Petitioner has a lifelong record of significant underachievement in both IQ and achievement testing, showing that he has been cognitively impaired since (at least) his childhood. *Id.* at 113. This is consistent with Petitioner suffering organic brain damage dating to his childhood. *Id.* at 82, 102-03, 113. The evidence that Petitioner suffered physical abuse as a child is also consistent with the early origin of his organic damage and psychological dysfunction. *Id.* at 109-10. Moreover, the descriptions of Petitioner's mother drinking during pregnancy suggest that Petitioner had organic brain damage at birth, as a result of fetal alcohol exposure. *Id.* at 102, 120.

160. Dr. Dattilio also described some of the effects child abuse has on those who suffer it. Abused children are hurt by the very people to whom they must look for security, which is "extremely" confusing to the child. *Id.* at 64-65. The long term, lasting effects of the abuse include impulse control problems, emotional lability, problems

controlling behavior, underachievement in school and life, impaired social relationships, social isolation, inability to relate healthily to others, inability to predict future consequences of actions, and central nervous system deficits. These problems often cause the abuse victim to engage in antisocial behavior later. Thus, child abuse is mitigating. *Id.* at 64-66, 70, 97, 114, 118-19. Here, the collateral sources show severe abuse and neglect, consistent with Petitioner suffering organic brain damage and with the psychological dysfunctions discussed above. *Id.* at 109-10.

161. Dr. Dattilio testified that a mental health expert performing a forensic evaluation should have information about the subject from sources other than the subject himself – i.e. the expert "absolutely" must have "collateral" data. *Id.* at 94, 105. Adequate collateral information is essential to an adequate forensic evaluation – the evaluator cannot rely upon the subject's self-reporting, especially since a cognitively impaired person often is incapable of being a good historian of his own life and background. *Id.* at 94, 104-05.

162. Moreover, collateral information is especially crucial when the subject comes from an abusive family, since there is so much denial in abusive families – in the child victim, in adult abusers and in other family witnesses. *Id.* at 106-07. In an adequate mental health evaluation, collateral data should be used along with very careful questioning of the subject. The evaluator must not just ask simple, direct "have you been hit in the head"-type questions, but must use the information garnered from the collateral data to undertake careful, in-depth probing. *Id.* at 111.

163. Dr. Dattilio, the Commonwealth's expert, also testified that the collateral information presented in these post-conviction proceedings – including family members' declarations, school records, medical and testing records and records about prior incarcerations and court involvement – are the kind of collateral data that a mental health professional would want and need in order to do an adequate forensic evaluation. *Id.* at 94, 109. He also explained that the particular background information about Petitioner is highly significant from a mental health standpoint.

164. Dr. Dattilio testified that Petitioner's school records are psychologically significant. The doctor noted that the school IQ scores are very low – when tested, between ages six and thirteen, Petitioner consistently scored in the mentally retarded range, with his highest score being a 75 (borderline retarded). *Id.* at 76-78. These IQ scores would make a mental health professional look for both organic brain damage and child abuse. *Id.* at 78. Petitioner's placement in special education is another red flag for brain damage and abuse at home. *Id.* at 78-79. *See also id.* at 82 (school records are consistent with presence of organic brain damage in childhood); *id.* at 102-03 (same). Given these school records, a mental health expert would "absolutely" and "definitely" want to look further for abuse and organic brain damage and explore these areas of mental health mitigation. *Id.* at 79-80, 99. In particular, a competent psychologist presented with these records would insist that neuropsychological testing be performed. *Id.* at 80.

165. Dr. Dattilio described the mental health significance of Petitioner's prison records from his prior incarceration. He testified that these are the types of records

that are important for a mental health expert to see. He testified that the prison MMPI results show the profile of a disturbed person. *Id.* at 73. These MMPI scores are consistent with Petitioner having been abused as a child and having organic brain damage – Dr. Dattilio explained that such test results require the exploration of child abuse and brain damage as causes. *Id.* at 68, 70-71, 114. These prison testing records are especially significant when combined with the school records, since they present a consistent, lifelong pattern of cognitive impairment and poor performance dating back to childhood. *Id.* at 112-13, 114. These prison records are the kind of collateral data that provide mental health mitigation and require further and thorough investigation into Petitioner's impairments. *Id.* at 99.

166. Dr. Dattilio also described some of the deficiencies in the mental health evaluations performed at the time of trial. None of the trial experts were provided any collateral data. Neither did they conduct the needed testing. Collateral data is essential; its absence here resulted in the failure to find or pursue several areas of mitigation; and its absence here led to inaccuracies in the trial expert reports. *See id.* at 105. Dr. Gross was not in a good position to find mitigation because he was not looking for it. *Id.* at 117. The only expert who tested Petitioner at all (in a limited way), Dr. Cooke, did not test for brain damage. *Id.* at 75-76. Because of these problems, Petitioner's brain damage and mental health mitigating factors went unexplored at the capital sentencing proceedings, and the jury never learned of this mitigation.

C. The Sixth Amendment Violations.

167. The Sixth Amendment standard for evaluating an ineffective assistance of counsel claim is set out in *Strickland v. Washington,* 466 U.S. 668 (1984). Petitioner must show: (1) counsels' deficient performance, *i.e.*, that his attorneys' performance fell below "an objective standard of reasonableness," *id.* at 688; and (2) prejudice, *i.e.*, that confidence in the result of the original sentencing proceeding is undermined due to counsels' deficiencies, *id.* at 694.

168. Both prongs of the *Strickland* test are established in this case: counsels' performance was deficient because they failed to reasonably investigate and develop mitigating evidence for capital sentencing; and counsels' failures were prejudicial because the unpresented mitigating evidence undermines confidence in the death sentence.

1. Petitioner was prejudiced by counsels' failures to investigate, develop and present mitigating evidence.

169. Prejudice is not an outcome-determinative test. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 693-94 (1984). The question is *not* whether representation by prepared and effective counsel would have actually changed the jury's ultimate sentencing verdict, nor even whether representation by effective counsel would "more likely than not" have changed the verdict. Instead, prejudice is established when *confidence in the outcome is undermined* because of counsel's deficiencies. *Strickland,* 466 U.S. at 693-94; *United States v. Day,* 969 F.2d 39, 45 n.8 (3d Cir. 1992) (prejudice showing "does not require

certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only 'reasonable probability' that that is the case").

170. In the context of a claim of ineffective assistance of counsel at capital sentencing, "the demonstrated availability of undiscovered mitigating evidence clearly me[ets] the prejudice requirement." *Blanco v. Singletary,* 943 F.2d 1477, 1505 (11th Cir. 1991); *accord Armstrong v. Dugger,* 833 F.2d 1430, 1433 (11th Cir. 1987); *Glenn v. Tate,* 71 F.3d 1204, 1211 (6th Cir. 1995); *Hill v. Lockhart,* 28 F.3d 832, 845 (8th Cir. 1994); *Cave v. Singletary,* 971 F.2d 1513, 1518-19 (11th Cir. 1992); *United States ex rel. Emerson v. Gramley,* 883 F. Supp. 225, 242 (N.D. Ill. 1995), *aff'd, Emerson v. Gramley,* 91 F.3d 898 (7th Cir. 1996).

171. Here, prejudice is established by the mitigating evidence presented post-conviction – mitigating evidence of Petitioner's neglectful and traumatic childhood, head injury, mental retardation, cognitive impairment, brain damage and alcoholism that could have been presented by effective counsel.

a. Mitigating evidence of petitioner's alcoholism.

172. The jury never heard about Petitioner's alcoholism. Following in his parents' footsteps and attempting to escape from the loveless, abusive environment in which he was raised, Petitioner and his brothers all began to drink heavily when they were very young, and Petitioner soon became an alcoholic. He drank extremely heavily before he went to jail in the 1970's. He again succumbed to his addiction and resumed his compulsive and excessive

drinking when he got out of prison before the instant offense. His heavy drinking throughout his life and at the time of the offense was confirmed by numerous entries in his prison records and police reports, which were available at and before the time of trial.

173. This substantial history of alcoholism, and its origins in Petitioner's abusive childhood at the hands of alcoholic parents, explains much about Petitioner and is mitigating. Indeed, the Commonwealth's own prison psychiatrist, Dr. Kate Erwin, found Petitioner's alcoholism to be so significant and mitigating that she *recommended his death sentence be commuted.* This evidence, however, was never presented to the jury. Counsels' failure to investigate, develop and present this evidence was prejudicial.[13]

b. Mitigating evidence of Petitioner's traumatic childhood.

174. The jury also never heard anything about the dysfunctional, violent and alcohol-soaked home into which

[13] *E.g., Kenley v. Armontrout,* 937 F.2d 1298 (8th Cir. 1991) (counsel ineffective for failing to investigate and present mitigating evidence of history of alcohol abuse and intoxication); *Eutzy v. Dugger,* 746 F. Supp. 1492, 1497-98 (N.D. Fla. 1989) (same), *aff'd,* 912 F.2d 1468 (11th Cir. 1990); *Middleton v. Dugger,* 849 F.2d 491 (11th Cir. 1988) (counsel was ineffective for failing to present mitigating evidence of history of drug abuse); *Stevens v. State,* 552 So.2d 1082, 1086 (Fla. 1989) (counsel was ineffective for failing to introduce evidence of defendant's history of alcohol abuse); *see also Hargrave v. Dugger,* 832 F.2d 1528, 1534 (11th Cir. 1988) (en banc) (death sentence violates eighth amendment when jury is not allowed to consider and give effect to history of drug abuse); *Mason v. State,* 597 So.2d 776, 780 (Fla. 1992) (same); *Commonwealth v. Bailey,* 480 Pa. 329, 390 A.2d 166 (1978) (non-capital case finding counsel ineffective for failing to investigate and present evidence of intoxication).

Petitioner was born and in which he spent his formative years. The evidence presented in post-conviction shows that Petitioner childhood home was an emotionally cold, frightening and violent place in which beatings and bizarre punishments constantly rained down on him; in which he was constantly subject to emotional abuse; in which he was physically neglected; and in which no love was ever expressed or felt.

175. Petitioner's parents were alcoholics. Their relationship with each other was hateful, emotionally abusive, and violent. The mother would disappear on drinking bouts or with other men. The father openly cheated on the mother, and the mother reacted violently, even attacking the father with knives in the family home. The father often beat the mother, driving her deeper into fear, despair and alcoholism. Her drinking was constant – she drank every day and never stopped – even when she was pregnant with Petitioner. As the children grew up, Petitioner and his brothers also developed severe drinking problems. Petitioner became an alcoholic.

176. The parents, especially the father, were frighteningly violent toward Petitioner and his siblings. Petitioner was beaten constantly, at least several times each week. These were not "spankings" – they were brutal beatings. The father was a big man, and the children were beaten with fists, sticks and leather straps. They were beaten hard all over their bodies, including on the head. When Petitioner's siblings sometimes tried to intervene and stop the father from battering Petitioner, they were violently shoved aside. Petitioner could not escape from the blows. No matter how Petitioner and his siblings screamed and cried, the beatings continued. The beatings

were so severe that Petitioner's sister still has nightmares about them.

177. The abuse Petitioner suffered was not just physical. In addition to the beatings, the father subjected Petitioner to other bizarre punishments. The father drove Petitioner to a nearby prison and threatened to send him there. The father locked Petitioner in a filthy, excrement-filed [sic] dog cage, where he had to crouch in fear until he was released, knowing that any attempt to escape would be met by further punishment.

178. The home was cold, unloving and emotionally abusive, and the children were physically neglected. Petitioner and his siblings were deprived of the necessities of life by the father's gambling and womanizing and the parents' alcoholism. They were left dirty and without care or supervision.

179. Petitioner was never given any love by his parents. He was never praised, never told he was a good boy, never told that someone was proud of him, never given any affection or approval at all. He never got any attention from his parents unless they were beating him. In this family, "You didn't get a hug. You didn't get 'good night.' You didn't get a 'happy birthday.' You got nothing." NT 3/29/96 at 129. Instead, the parents constantly screamed at Petitioner that he was dumb, that he was stupid, that he was a "nitwit," that he was worthless and would never amount to anything.

180. The children, while being subjected to this violence, neglect and abuse, were forced to live in isolation from the outside world and under the constant, intrusive gaze of their terrifying father. The father would not allow the children to have friends; they were not allowed to have

anyone visit; they were not allowed to visit others; and they were not allowed to go to athletic or social events. They had no outside connection with anybody. The father watched the children constantly – forbidding them to even have the privacy of a bedroom door. Petitioner's siblings could not recall a single happy moment in the family's life.

181. The jury never heard any of this compelling evidence of Petitioner's childhood mistreatment, neglect and unhappiness. Counsels' failure to present this evidence was prejudicial.[14]

c. Mental health-related mitigation.

182. Petitioner was also prejudiced by counsel's failure to investigate, develop and present this mental-health related mitigating evidence.

183. Petitioner's traumatic upbringing, in addition to providing substantial mitigation in-and-of itself, also constitutes significant mental health-related mitigation.

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[14] *E.g.*, *Wade v. Calderon*, 29 F.3d 1312, 1323 (9th Cir. 1994) (vacating death sentence on ineffective assistance of counsel grounds when counsel failed to present evidence of defendant's traumatic childhood); *Blanco*, 943 F.2d at 1499-1503 (same); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (same); *Kenley v. Armontrout*, 937 F.2d 1298, 1305 (8th Cir. 1991) (same); *Brewer v. Aiken*, 935 F.2d 850, 857-60 (7th Cir. 1991) (same); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) (same); *Eutzy v. Dugger*, 746 F. Supp. 1492, 1497-98 (N.D. Fla. 1989) (same), *aff'd*, 912 F.2d 1468 (11th Cir. 1990); *Jermyn v. Horn*, No. 1:CV-97-634, 1998 WL 754567, at *8-17 (M.D. Pa. Oct. 27, 1998) (same); *see also Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) ("because of [defendant's] history of childhood abuse, [the sentencer] could also conclude that [defendant] was less morally culpable than defendants who have no such excuse"); *id.* at 324 (death sentence overturned because sentencer was not permitted to give full effect to evidence of childhood abuse).

Petitioner's siblings described some of the terrible effects that this childhood had on him. They described a boy who was always "different," who felt lost and rejected, who cried often, who was very nervous and who would sit silently and alone, isolated from any help and in fear of his vicious and hateful father. Petitioner began to drink heavily when he was young, and soon became an alcoholic.

184. Moreover, it is uniformly acknowledged in the mental health profession that victims of such child abuse and neglect are left psychologically impaired by their suffering. *See, e.g.*, Helfer & Kempe, THE BATTERED CHILD, Chapters 9-10, 17-20 (4th ed. University of Chicago Press); Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY at 1365-67 (5th ed.) (schizoid and paranoid disorders have direct correlations to childhood abuse and neglect); *id.* at 1964-66 (results of childhood abuse and neglect include cognitive and developmental impairment; post-traumatic stress disorder; pathological object relationships; primitive defense mechanisms; impaired impulse control; poor self-concept and depression; masochistic and self-destructive behavior; difficulties in school adjustment; and central nervous system impairment).[15] The experts who testified post-conviction, including those retained by trial counsel and even the Commonwealth's "rebuttal" expert, Dr. Dattilio, described the debilitating, permanent, mitigating mental health deficits caused by Petitioner's childhood. The mental health professionals uniformly agree that the lasting adverse effects of abuse and neglect

[15] Kaplan & Sadock is a standard work in the mental health field that is relied upon by mental health professionals and has been often cited by the courts. *See, e.g., Mills v. Rogers,* 457 U.S. 291, 293 n.1 (1982); *Hays v. Murphy,* 663 F.2d 1004, 1010 n.10 (10th Cir. 1981).

include impulse control problems, emotional lability, depression, hopelessness, despair, problems controlling behavior, underachievement in school and life, low self-esteem, impaired social relationships, social isolation, inability to relate healthily to others, fear and mistrust, inability to deal with and resolve problems, inability to understand cause and effect, inability to predict future consequences of actions, and central nervous system deficits.

185. In short, child abuse and neglect such as that suffered by Petitioner causes permanent emotional and psychological disturbances, and "helps to explain," to a sentencing jury that has just convicted the defendant of first degree murder "how the person got to where they are, why they are the types of people they are." Cooke Deposition at 29. Because counsel failed to investigate, develop and present the evidence, the jury never heard any of this powerful mitigation. Even the Commonwealth's "rebuttal" expert agreed that a dysfunctional family background – including abuse, deprivations and mistreatment such as that suffered by Petitioner – is important and provides significant mental health mitigation. Petitioner was prejudiced by counsels' failure to investigate, develop and present this mitigating evidence.

186. The jury also never heard anything about Petitioner's severe and long-standing organic brain damage. It is undisputed that Petitioner suffers from organic brain damage. Even the Commonwealth's "rebuttal" expert, Dr. Dattilio, so testified. It is also undisputed that Petitioner's brain damage is mitigating. The experts, including the Commonwealth's "rebuttal" expert, agreed that Petitioner's brain damage causes significant and

severe impairments in his emotional, psychological and cognitive functioning.

187. Petitioner's organic brain damage is undoubtedly mitigating. The experts, including Dr. Dattilio, explained that Petitioner's brain damage has a drastic, debilitating impact on his personality and ability to function. His brain damage impairs and undermines his judgment, reasoning, cognition, mental flexibility, impulse control, emotional lability, ability to solve problems, ability to make sense out of experience, ability to understand and respond appropriately to his environment, ability to plan, ability to predict the consequences of behavior and ability to control his behavior. *See also* Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY at 599 (5th ed.) (describing some of the debilitating effects of brain damage, including "psychotic features"; "anxiety features"; "affective features"; "mood Problems"; "features usually associated with personality disorders"; "emotional problems"; and "cognitive impairment features"). The jury, however, never heard any of this mitigating evidence.

188. The experts who have tested and evaluated Petitioner for brain damage testified that his brain damage is long-standing. Again, even Dr. Dattilio agreed that there is real evidence of brain damage here and that it is important and mitigating. The effects of his brain damage have plagued Mr. Rompilla throughout his adult life. It dates back at least into his childhood, and possibly occurred in utero. As a result of his organic brain damage, at time of the offense Petitioner suffered from an extreme mental and emotional disturbance, and his capacity to appreciate criminality of conduct or conform conduct to requirements of law was substantially impaired. The jury, however, did not hear any of this powerful mitigating

evidence because counsel did not investigate, prepare and present it. Petitioner was prejudiced by counsels' failures.

189. Counsel also failed to obtain or present to the jury or to mental health experts a wealth of documentary evidence of Petitioner's lifelong history of mental retardation, cognitive impairment and inability to function, including medical records, school records, prison psychological records (which were included in prior court files that were readily available pretrial and at the time of trial), and information regarding Petitioner's history of head injuries.[16]

190. Petitioner's medical records show that he was hospitalized at age two with severe diarrhea and a fever that exceeded 105°F. The mental health experts testified that this type of childhood medical trauma is related to permanent organic brain damage, that these medical records are therefore, at least, a "red flag" for brain damage, and that any mental health expert presented with these records would perform brain damage testing or request that such testing be done. Trial counsel, however,

[16] The experts described the connection between Petitioner's history of impairments and his impairments at the time of the offense. Moreover, even if the expert testimony had not related to the existence of deficits at the time of the offense (it did), expert testimony about the defendant's *history* of mental impairments is still admissible, relevant and valid mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (failure to consider evidence of emotional disturbance preceding offense and difficult family history constitutional error); *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring) ("Evidence concerning . . . [the defendant's] emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment"); *Smith v. Singletary*, 61 F.3d 815, 817-18 (11th Cir. 1995) (sentencer's failure to consider evidence of alcohol abuse and mental problems preceding offense violated the constitution).

did not obtain or make use of these records. Therefore, the jury and the experts never learned of them and the experts never tested Petitioner for brain damage – because they never knew that Petitioner's history presented, at least, substantial signs demanding that brain damage testing be done.

191. Petitioner's school records show that he consistently scored in the mentally retarded range on standardized, reliable IQ tests; that he was placed in special education classes starting in the fourth grade, where he remained until he left school in ninth grade; that his academic abilities never progressed beyond the third grade level throughout his schooling; and that his father would not cooperate with school officials in their attempts to help Petitioner. Trial counsel, however, did not obtain or make use of these records. Therefore, the jury never learned of this compelling mitigating evidence of Petitioner's lifelong history of mental deficits. Moreover, at the PCRA hearing the mental health experts testified that these school records, like the hospital records, are unmistakable "red flags" indicating that Petitioner was suffering as a child from the effects of brain damage and child abuse. Because counsel failed to obtain these records, however, the trial experts never learned of these substantial signs of brain damage and child abuse, and never undertook the necessary brain damage testing and child abuse inquiry and the jury never heard about it.

192. Petitioner's prison records from 1976, long before the offense, contain psychological and achievement test results showing that he was still suffering from the cognitive deficits exhibited in his school records, that he was psychologically disturbed, and that he had a history of alcoholism. Trial counsel did not obtain or make use of

these records, notwithstanding the fact that they were included in the court file from Petitioner's prior conviction that was used against him at the penalty phase and was maintained in the same building in which the capital proceedings were conducted. The jury never learned of this mitigating evidence. Moreover, like the medical and school records, these prison/court records contain numerous significant signs that Petitioner was suffering from organic brain damage and from lasting effects of his abusive childhood. Because counsel did not obtain these records or provide them to mental health experts, Petitioner's significant mental health and cognitive deficits were never considered by the jury.

193. Petitioner has a history of serious head injuries dating back to childhood. These head injuries, like his impaired performance on standardized tests documented in his school and prison/court records, are another sign of Petitioner's organic brain damage, since head trauma is a common cause of such damage. Counsel should have been aware that Petitioner had suffered head injuries, since at the time of trial the scars were still visible on Petitioner's forehead. But counsel never pursued this important information, never presented it to the jury, and never presented it to the mental health experts who could have conducted the appropriate testing for brain damage. The jury never heard this mitigating evidence.

194. In short, there was a wealth of compelling mental health-related mitigation to present in this case,

but counsel never presented any of it. Petitioner was prejudiced by counsels' failures.[17]

d. The combined mitigating effect of Petitioner's history and deficits.

195. Each of the above-described areas of mitigation is compelling, would have given the capital sentencing jury a powerful case for life, and establishes prejudice. Moreover, the sum total of Petitioner's deficits was particularly debilitating at the time of the offense and provides even more powerful mitigation. The combination of his brain damage, the lasting effects of his abusive childhood, his alcoholism and the stress of his recent release from prison created a "snowballing effect" which led to severe psychological, emotional and cognitive impairments at the time of the offense.

196. Thus, the jury did not know that Petitioner's impairments and history constitute an extreme mental and emotional disturbance, *see* 42 Pa.C.S. § 9711(e)(2); a substantially impaired capacity to conform conduct to the requirements of law, *see* section 9711(e)(3); and myriad background mitigating factors under section 9711(e)(8). Petitioner was clearly prejudiced by counsels' failure to

[17] *E.g.*, *Middleton v. Dugger*, 849 F.2d at 495; *Blanco*, 943 F.2d at 1505; *Brewer v. Aiken*, 935 F.2d 850, 857-60 (7th Cir. 1991); *Glenn*, 71 F.3d at 1211; *Armstrong v. Dugger*, 833 F.2d 1430, 1433-34 (11th Cir. 1987); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991); *Eutzy*, 746 F. Supp. at 1497-98, *aff'd*, 912 F.2d 1468; *Commonwealth v. Smith*, 544 Pa. 219, 675 A.2d 1221, 1233-34 (1996) (prejudice results when counsel fails to present evidence that defendant "has suffered some mental problems").

investigate, prepare and present this overwhelming mitigating evidence.

e. Rebuttal of the aggravating circumstances.

197. In addition to its enormous weight as mitigation, the evidence of Petitioner's alcoholism, traumatic childhood, organic brain damage and other deficits also would have substantially weakened the prosecution's aggravating evidence. The aggravating circumstances found by the jury in this case included 42 Pa.C.S. § 9711(d)(8) ("The offense was committed by means of torture.") and (d)(9) ("The defendant has a significant history of felony convictions involving the use or threat of violence to the person."). The weight accorded to these aggravating circumstances would have been substantially lessened if the jury had known about Petitioner's organic brain damage, alcoholism, abusive childhood and other deficits.

198. In support of the (d)(9) aggravating circumstance, the prosecution presented evidence of Petitioner's prior convictions for rape and burglary. The overwhelming deficits caused by Petitioner's organic brain damage, childhood trauma and alcoholism cast this criminal history in a very different light, greatly reducing its aggravating weight, and making it less "significant." Because the jury did not know about Petitioner's organic brain damage and other deficits, however, it did not know that Petitioner acquired these prior convictions while suffering from organic deficits that constitute an extreme mental and emotional disturbance and that substantially impaired his capacity to appreciate the consequences of conduct or to

conform his conduct to the requirements of law. Accordingly, the jury gave this aggravation much greater weight than it would have been given if the jury had known the accurate facts about Petitioner.

199. The same is true of the (d)(8) "torture" aggravating circumstance. If the jury had known of Petitioner's traumatic childhood, alcohol abuse and brain damage, and the deficits associated with these problems, it would have been less likely to find this aggravating circumstance, and would have accorded less weight to it even if it had found it.

200. In short, Petitioner's abusive and neglectful childhood, alcoholism, mental retardation, history of cognitive impairment and organic brain damage, had it been presented to the jury, would have "totally change[d] the evidentiary picture" at the capital sentencing proceeding, since it would have provided powerful "mitigation, [and] also [would have] significantly weaken[ed] the aggravating factors." *Middleton v. Dugger,* 849 F.2d 491, 495 (11th Cir. 1988); *accord Baxter v. Thomas,* 45 F.3d 1501, 1515 (11th Cir. 1995). Counsels' failure to investigate, prepare and present this evidence undermines confidence in the outcome of the sentencing proceeding. Petitioner was prejudiced by counsels' failures.

2. Counsels' performance was deficient.

201. As described above, the mitigating evidence that could have been presented but was not clearly establishes prejudice. It is equally clear that this prejudice arose from counsels' deficient performance – their failure to adequately investigate and develop the mitigating evidence.

202. Thorough investigation, preparation and presentation of mitigating evidence is a fundamental prerequisite to the constitutionally effective representation of counsel in a capital case. "Given the severity of the potential sentence and the reality that the life of [the defendant] [is] at stake," it is capital counsel's "*duty . . . to collect as much information as possible about [the defendant] for use at the penalty phase.*" *Hill v. Lockhart,* 28 F.3d 832, 845 (8th Cir. 1994). Accordingly, "[i]n cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant," counsel's representation has consistently been held to be "beneath professionally competent standards." *Jackson v. Herring,* 42 F.3d 1350, 1367 (11th Cir. 1995).[18]

203. As part of capital counsel's constitutional duty to [sic] "to collect as much information as possible," *Hill,* and "formulate an accurate profile" of the client for the capital sentencing hearing, *Jackson,* counsel must investigate and develop mitigating evidence of childhood abuse and neglect, alcoholism and mental health impairments. *See* cases cited *supra.* To do so, counsel must obtain and make use of records pertaining to the client, his family and

[18] *See also Emerson,* 883 F. Supp. at 242-44 (under the Sixth Amendment, counsel must conduct a full and "meaningful investigation for mitigating evidence"; counsel is "under a greater obligation to discover and evaluate potential evidence of mitigation" in capital cases because the penalty phase is the stage "where counsel can do his or her client the most good"), *aff'd,* 91 F.3d 898; *Glenn,* 71 F.3d at 1208 (capital counsel must fully and "systematic[ally]" investigate and develop "their client's social history"); *Williamson v. Ward,* 110 F.3d 1508, 1514 (10th Cir. 1997) ("in a capital case, counsel's duty to investigate all reasonable lines of defense is strictly observed").

background;[19] counsel must fully interview family members who are familiar with the client's background;[20] and

[19] *E.g., Hill*, 28 F.3d at 845 (information that must be collected by effective counsel includes records about the defendant); *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) (same); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981) (same); *Glenn*, 71 F.3d at 1208 (capital counsel have a duty to fully investigate "their client's social history" by, *inter alia*, seeking out and examining school, medical, probation and other records); *Claibourne v. Lewis*, 64 F.3d 1373, 1377, 1385 (9th Cir. 1995) (counsel was ineffective for failing to seek out records about the defendant); *Baxter v. Thomas*, 45 F.3d 1501, 1512-14 (11th Cir. 1995) (counsel was ineffective for failing to seek out the client's school and juvenile delinquency records, and the low IQ scores in the records counsel did not obtain established prejudice for purposes of capital sentencing); *Middleton v. Dugger*, 849 F.2d 491, 493-94 (11th Cir. 1988) (capital counsel is ineffective when counsel fails to obtain school, hospital, juvenile and prison records even if those records are in another state hundreds of miles away [Florida/New York] from the trial state; and the evidence of low IQ, childhood mistreatment and mental problems in those records demonstrated prejudice for purposes of capital sentencing); *Martinez-Macias v. Collins*, 810 F. Supp. 782, 820 (W.D. Tex. 1991) (counsel was ineffective for failing to obtain records from juvenile facility), *aff'd*, 979 F.2d 1067 (5th Cir. 1992); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4.1, Investigation, §§ 2C & 2D (capital counsel should secure releases and obtain hospital, treatment, school and mental health records; *cf. Strickland*, 466 U.S. at 689 (ABA standards are useful guides for determining if counsel's performance was reasonable)); *Commonwealth v. Mabie*, 467 Pa. 464, 359 A.2d 369, 374 (1976) (even in non-capital case, counsel has duty to seek out records and is ineffective if she fails to do so).

[20] *E.g., Martinez-Macias*, 810 F. Supp. at 787, 817-18 (W.D. Tex. 1991) (ineffective assistance of counsel where counsel failed to fully interview the defendant's family about the defendant's life history before proceeding to capital sentencing), *aff'd*, 979 F.2d 1067 (5th Cir. 1992); *Baxter v. Thomas*, 45 F.3d at 1512-13 (same); *Kenley v. Armontrout*, 937 F.2d 1298, 1306-07 (8th Cir. 1991) (same); *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (counsel's failure to interview potential witnesses violates the duty to investigate and constitutes deficient performance); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*,

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counsel must obtain expert mental health evaluations for mitigation, work closely with the mental health expert and present expert testimony regarding mental health-related mitigating circumstances.[21]

Guideline 11.4.1, Investigation, §§ D.2.C, D.3.B & D.3.C (directing counsel to seek out information regarding "family and social history (including physical, sexual or emotional abuse)" by, *inter alia*, interviewing family members and others familiar with the defendant's life history); *id.*, Guideline 11.8.3, Preparation for the Sentencing Phase, § F (same); *see also Eddings*, 455 U.S. at 116 (defendant's "background and mental and emotional development" are relevant mitigating circumstances).

[21] *E.g., Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987) (counsel ineffective at capital sentencing when he fails to present mental health testimony at the sentencing hearing, when expert testimony "would have provided the jury with a more long-term view of [the defendant's] emotional problems"); *Middleton*, 849 F.2d at 495 (counsel ineffective for failing to present expert mental health testimony that "could well have met the standard for statutory mitigating factors"); *Antwine v. Delo*, 54 F.3d 1357, 1366-67 (8th Cir. 1995) (counsel was ineffective at the penalty phase where he relied on mental health evaluation that was prepared for purposes of investigating guilt phase defenses); *Claibourne v. Lewis*, 64 F.3d 1373, 1377, 1384-85 (9th Cir. 1995) (counsel was ineffective at sentencing when his guilt phase questioning of mental health experts did not include questions about statutory mitigating circumstances and he did not recall the experts at sentencing; "In short, [counsel] never asked these experts ... to expound on mitigation."); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981) (courts have "repeatedly stressed the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel" (citing *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974))); *Glenn*, 71 F.3d at 1210 n.5 ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant"); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.8.6, The Defense Case at the Sentencing Phase, §§ B.1, 8 (counsel should always investigate and consider presenting the client's "[f]amily and social history (including physical, sexual or

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204. Here, counsel failed to take these steps, which are the minimum requirement of effective representation at capital sentencing.

a. Counsel failed to investigate mitigating evidence of Petitioner's alcoholism.

205. Counsel failed to investigate, develop or present the mitigating evidence of Petitioner's alcoholism, and the jury never heard the mitigating evidence of Petitioner's lifelong alcohol addiction.

206. At the time of trial there was significant available evidence of Petitioner's long history of alcoholism – evidence that was either known to trial counsel or would have been known if counsel had reasonably investigated.

207. Information *in counsels' possession* would have led effective counsel to investigate and present the mitigating evidence of Petitioner's longstanding alcohol abuse. Petitioner *told counsel* that he had been drinking on the night of the offense. He told counsel that during the hours leading up to the offense he had been drinking in bars all night – from supper time until the bars closed at 2:00 a.m. NT 3/28/96 at 126-27 (Ms. Dantos). This alone should have spurred counsel to investigate, and there was much more.

208. Police reports, provided to counsel in discovery and in their possession at the time of trial (Exhibit 15),

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emotional abuse, neighborhood surroundings" as well as "[e]xpert testimony concerning [such a background] and the resulting impact on the client"); *see also Ake v. Oklahoma*, 470 U.S. 68 (1985) (stressing importance of expert mental health assistance in capital cases).

indicate that Petitioner had been drinking very heavily at and around the time of the offense; that he had started drinking heavily in the early afternoon prior to the offense and had been on a "drinking bout all night" on the night of the offense; that he was "drunk," "severe[ly]" intoxicated and "passed out" that night; and that when he arrived at a motel shortly after the offense he was so "drunk or high" that "he was not very coherent and could not find [his room] on his own." Despite this clear evidence – in counsels' possession – that Petitioner was grossly impaired from alcohol consumption, counsel failed to investigate.

209. Moreover, the report from Dr. Gross to counsel (Exhibit 6), also in counsels' possession at the time of trial, is replete with information that should have caused counsel to investigate the mitigating evidence of Petitioner's alcohol abuse – including *a specific recommendation that counsel investigate this area.*

210. Dr. Gross' report indicates that Petitioner *had been drinking for fourteen hours straight* (from lunch time until approximately 2:00 a.m.) on the day and evening of the offense, with only a brief break for supper; that he *could not recall how much he had drunk* during that time; that he was spending nearly all his time in bars and drinking heavily in the days near the time of the offense; that he *attended Alcoholics Anonymous* while he was in prison; and that *he was fearful of admitting his drinking* because it was a parole violation. Dr. Gross concluded by recommending that Petitioner's heavy drinking and the possibility of alcoholic blackout *ought to be further investigated.* Counsel, however, did no such investigation.

211. Thus, trial counsel *had information in their possession,* from Petitioner, from police reports, and from

Dr. Gross, that Petitioner was an alcoholic who had been drinking heavily during the hours before the offense and was so drunk around the time of the offense that he was incoherent. Despite this knowledge, and despite Dr. Gross' specific recommendation that counsel further investigate Petitioner's alcohol problems, counsel did *nothing* to investigate, prepare or present this mitigating evidence. Counsel were ineffective.

212. Moreover, there was even more information showing Petitioner's lifelong struggle with alcoholism that counsel did *not* possess, but would have possessed if they had reasonably investigated. Petitioner's prior prison and court records (Exhibits 12-14), which would have been obtained by effective counsel, *see infra,* unambiguously state that Petitioner had a history of "over-indulgence in alcoholic beverages"; that he needed "counseling pertaining to his long standing abuse of alcohol"; and that there was a history of alcoholism in his family. Petitioner's family would also have described to trial counsel the development and effects of Petitioner's alcohol abuse if they had been asked. Counsel, however, failed to do the needed investigation and, therefore, was not aware of this evidence about Petitioner's alcoholism. They were ineffective.

213. Counsel testified that the evidence of Petitioner's alcohol dependency was not presented to the jury because counsel was not aware that there was any alcohol-related mitigation to present. NT 3128/96 at 129. Counsels' claimed ignorance of any alcohol-related mitigation, however, is entirely inconsistent with counsels' testimony that Petitioner himself told counsel of his drinking on the night of the offense and with Dr. Gross's specific recommendation that this area be further investigated. Moreover, to the extent that counsel were ignorant of

Petitioner's alcoholism, that ignorance resulted from counsels' failure to read the police reports in their possession; failure to investigate and follow up on Dr. Gross' recommendation; and failure to otherwise investigate, as described above. Thus, this evidence was never investigated and presented simply because counsel ineffectively failed to follow up on and develop evidence of Petitioner's drinking problems that was *known* to counsel, and failed to do the rudimentary investigation of Petitioner's records that would have revealed conclusive evidence of Petitioner's alcoholism. Counsel were ineffective.

b. Counsel failed to obtain medical, school, prison and court records.

214. Counsel completely ignored their duty to obtain records that might assist in "formulat[ing] an accurate profile" of Petitioner. *Jackson v. Herring*, 42 F.3d at 1367. Counsel made *no* attempt to obtain, and did not obtain, any school records, medical records, records from prior incarcerations, records from prior convictions, prior court records, or any other records about Petitioner and his life. As a result of this failure to obtain any records about Petitioner, counsel were unable to present to the jury the wealth of mitigating evidence these records contain, including Petitioner's long history of psychological and cognitive impairment and mental retardation; his history of failure in school and life; his physically and emotionally impoverished family background; his neglectful childhood at the hands of alcoholic parents; and his alcoholism.

215. These records were not obscure or difficult to find. For example, Petitioner's school records were in the Board of Education building across the street from the

courthouse in which the pretrial and trial proceedings were held; the prison mental health evaluation records were readily available by request to the Department of Corrections, and were also contained in the Court of Common Pleas Clerk's Office, in the same courthouse; and the medical records were obtained from the same hospital where Petitioner's blood was tested for forensic purposes when he was arrested in this case. Counsel were ineffective for failing to take the rudimentary investigative steps required to obtain these records. *Compare Middleton v. Dugger,* 849 F.2d 491, 494 (11th Cir. 1988) (counsel is ineffective when counsel fails to obtain records about the client, even if those records are in another state hundreds of miles away (Florida/New York) from the trial state).

216. In addition to the duty that counsel have in *every* capital case to seek out such medical, school, incarceration, court and other background records about the defendant, there are specific factors about this case that made the collection of such records especially imperative and made counsels' duty to obtain the records especially clear.

217. First, the prison records that contain the relevant mitigating and mental health evidence (for example, the 1976 "Initial Transfer Petition and Initial Classification Summary") were available *in the Court of Common Pleas file* on Petitioner's prior rape/burglary conviction, which is maintained in the Clerk's office at the Lehigh County Courthouse. *See* NT 3/28/96 at 206. Thus, if trial counsel had made even the most rudimentary investigation of the prior rape/burglary convictions – by simply looking through the court file for that case – counsel would have discovered this crucial evidence.

Counsel, however, failed to take even this most rudimentary step.

218. "Few aspects of representation can be more critical than understanding the client's criminal history." *Siripongs v. Calderon,* 35 F.3d 1308, 1316 (9th Cir. 1994) (counsel is ineffective at the penalty phase when her poor understanding of client's criminal record results in failure to present mitigating evidence). A thorough understanding of these particular prior convictions was especially essential to effective representation in this case because *the prosecution used these convictions,* as defense counsel knew long before trial that it would, *to establish an aggravating circumstance* that Petitioner had "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. § 9711(d)(9).

219. Counsel, however, never bothered to look at the court file related to these prior offenses and therefore never discovered or utilized the invaluable mitigating evidence the file contained. *E.g.*, NT 11/1/88 at 31, 40-44. Counsel knew well before the penalty phase began that the prosecutor would use the prior convictions and records about them at the penalty phase. NT 3/28/96 at 231. Yet, even as the penalty phase was about to begin, counsel still had not examined the court records from the prior case that was about to be used in aggravation. *See, e.g.,* NT 11/1/88 at 31 (when defense counsel complained that he did not have information about the prior convictions, the prosecutor responded: "it's a public record, Fred, you could have gone over lunch and looked at it just like I did"); NT 11/1/88 at 40-41 (defense counsel reviews, for the first time, copies of the indictment and the transcripts from the prior conviction, after they are provided to counsel by the prosecutor). At the PCRA hearing, counsel confirmed that

they never bothered to look at the court file on these crucial prior convictions. *E.g.*, NT 3/29/96 at 54 (counsel's action on prior convictions limited to what prosecution chose to provide by discovery).

220. Thus, even though Petitioner's prior convictions were used to establish an aggravating circumstance at the capital sentencing proceeding, and even though counsel knew long before trial that they would be so used, counsel never bothered to investigate the facts of these prior convictions and never bothered to take even the simple step of looking at the court files regarding those convictions. Instead, counsel said he relied on the prosecutor to provide "discovery." It is axiomatic that "investigation consisting solely of reviewing [the] prosecutor's file 'fell short of what a reasonably competent attorney would have done.'" *United States v. Gray,* 878 F.2d 702, 711 (3d Cir. 1989) (quoting *Thomas v. Lockhart,* 738 F.2d 304, 308 (8th Cir.1984)); *accord Commonwealth v. Mabie,* 467 Pa. 464, 359 A.2d 369, 374 (1976) (reliance on "the prosecution's file is not a substitute for an independent investigation by defense counsel"); *Commonwealth v. Baxter,* 537 Pa. 41, 640 A.2d 1271, 1275 n.3 (1994) (same). Counsel rendered deficient performance when they failed to examine the prior case files, and thus failed to discover the DOC records and the mitigating evidence they contained and would have led to.

221. Moreover, there is another particular aspect of this case that would inexorably have led effective counsel to obtain the prior prison records and thus uncover the powerful mental health mitigating evidence that actually existed. It was well-established by the time of this trial that "evidence bearing on the defendant's ability to adjust to prison life" is relevant mitigating evidence. *Skipper v.*

South Carolina, 476 U.S. 1, 6 (1986). At the time that Petitioner was arrested for the instant offense, he had spent much of his life in prison or juvenile facilities. He had only recently been released from a lengthy incarceration resulting from his prior convictions. Indeed, counsel complained at the PCRA hearing that Petitioner's family "didn't really feel as though they knew" Petitioner as an adult because he had spent so much time in custody. NT 3/28/96 at 47. Under these circumstances, Petitioner's prison evaluations and reports offered counsel a potentially rich source of mitigation that should have been investigated. Counsel, however, did not investigate this area of mitigation at all, and did not get Petitioner's prison records.

222. If counsel had performed effectively and obtained Petitioner's prison records as part of an investigation for potential mitigation, they would have found the Department of Corrections 1976 "Initial Transfer Petition and Initial Classification Summary" (Exhibit 12). As described above, these prison records contain psychological tests reflecting cognitive, emotional and psychological impairments; they show that Petitioner had a history of severe alcoholism; and they indicate that Petitioner was raised in a "slum environment." Moreover, these prison records, which would have been obtained by effective counsel, refer to, and would have led effective counsel to, Petitioner's juvenile court records (*see* Exhibits 12-14) which, as described above, state that Petitioner's IQ is in the mentally retarded range; note that he is easily influenced and led by others; and describe the extreme neglect, lack of supervision, alcoholism and instability in his childhood home. Thus, these records contain significant mitigating evidence that the jury never heard. Counsel

rendered deficient performance by failing to seek or obtain them.

c. Counsel failed to provide background information about Petitioner to mental health experts.

223. In addition to presenting the mitigating evidence that is apparent on the face of the medical, school, prison and court records, effective counsel would have provided the records to the mental health experts, leading to the development and presentation of the mental health-related mitigating evidence of Petitioner's organic brain damage, abusive childhood and alcoholism.

224. The mental health profession and the courts have recognized that a reliable forensic mental health evaluation must include consideration of "collateral information" about the defendant – *i.e.*, information that comes from sources other than the defendant himself. Collateral sources of information are critical to a reliable forensic mental health evaluation because the defendant's ability to relate his own history and problems is often impaired – mentally ill persons tend to be poor historians; they hide rather than reveal symptoms; they are often (irrationally) afraid of what will happen to them if they do reveal their history or symptoms; and they often lack insight into their problems. As a result, without collateral sources of information, the defendant's mental illness and its full extent and implications may remain hidden. *E.g.*, Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY at 488, 550 (4th ed.); Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process,* 66 VA. L. REV. 427 (1980); American Psychiatric Association, *Report of the Task Force on the Role of Psychiatry in the*

Sentencing Process, ISSUES IN FORENSIC PSYCHIATRY 202 (1984); Pollack, *Psychiatric Consultation for the Court,* 1 BULL. AM. PSYCH. & L. 267, 274 (1974); H. Davidson, FORENSIC PSYCHIATRY 38-39 (2d ed. 1965); *Mason v. State,* 489 So.2d 734, 737 (Fla. 1986).

225. The experts who testified post-conviction, including trial experts and the Commonwealth's "rebuttal" expert, Dr. Dattilio, agreed that independent, collateral information about the defendant is a crucial prerequisite for a professionally appropriate and reliable forensic mental health examination. *See, e.g.,* Sadoff Deposition at 30-31 (testimony of Dr. Sadoff regarding importance of collateral information in forensic examination, discussed *supra*); Dattilio Deposition at 94, 104-107, 111 (testimony of Dr. Dattilio, same). Moreover, the doctors explained, collateral information about Petitioner was especially needed here because Petitioner remembers little about his childhood, except that he was always called a "dummy," Armstrong Deposition at 27; because Petitioner's brain damage, low intelligence and cognitive impairments make him a poor historian, Crown Deposition at 82; Dattilio Deposition at 94, 104-05; and because Petitioner is the product of an abusive family, which results in "denial" and the need for particularly careful questioning based upon independent information, Dattilio Deposition at 106-07, 111. *See also Williamson v. Ward,* 110 F.3d at 1518 ("An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment."); *Blanco v. Singletary,* 943 F.2d 1477, 1502 n.121 (11th Cir. 1991) (same).

226. Because of the critical importance of such collateral information, capital defense counsel are ineffective when they fail to provide such information to mental health experts who are performing evaluations for capital sentencing.[22] Here, counsels' ineffective failure to seek or obtain

[22] *E.g.*, *Glenn v. Tate*, 71 F.3d 1204, 1208, 1210 n.5 (6th Cir. 1995) ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant"; counsel was ineffective when "[t]he lawyers made no systematic effort to acquaint themselves with their client's social history" and, instead, relied upon expert evaluations); *Antwine v. Delo*, 54 F.3d 1357, 1365-66 (8th Cir. 1995) (counsel was ineffective for not independently investigating the client's mental health history and relying instead on a psychiatrist's report where the report was based on an interview and review of police background sheet); *Kenley v. Armontrout*, 937 F.2d 1298, 1304-08 (8th Cir. 1991) (counsel was ineffective for not fully investigating the client's background and mental health history and, instead, relying on a psychiatrist's report, where the report contained incomplete psychological test results, did not indicate that the psychiatrist had reviewed the defendant's military records, and contained no evidence that the psychiatrist had contacted the defendant's family); *Claiboume v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (counsel was ineffective where defendant was seen by three mental health doctors, but counsel failed to provide the doctors with collateral information, such as records and statements from those who knew the defendant); *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) (counsel were ineffective where they had their client examined by a psychiatrist and relied on the expert's report without doing any other investigation into the defendant's mental health history; the attorneys' failure to further investigate Profitt's mental health background and history "clearly [fell] below the level of customary skill and knowledge required of attorneys"); *Beavers v. Balkom*, 636 F.2d 114, 116 (5th Cir. 1981) (courts have "repeatedly stressed the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel"; finding counsel ineffective for failing to obtain mental health records about his client and relying instead on a doctor's report (citing *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974))).

any collateral information about Petitioner – the school, medical, prison, court and other records – led directly to counsels' failure to present the overwhelming mental health mitigation that was presented post-conviction.

227. In post-conviction, every mental health expert, including the experts retained at the time of trial and the Commonwealth's "rebuttal" witness, testified that the kind of collateral background information that would have been discovered upon reasonable investigation in this case (*e.g.*, Petitioner's medical, school, prison and court records) is important and necessary information for a professionally adequate and reliable mental health evaluation. Every expert testified that Petitioner's medical, school, prison and court records contain numerous, unmistakable, and important indications that Petitioner suffered from child abuse and organic brain damage. Every expert testified that a competent mental health expert presented with these records would have demanded that further inquiry, testing and evaluation be done to determine the source of the real psychological impairments these records reveal. Every expert testified that if these records had been presented to them at the time of the trial they would have performed neuropsychological (brain damage) testing, or would have requested that such testing be done by a qualified expert.[23]

228. In short, if counsel had performed effectively, obtained Petitioner's records and provided them to the

[23] Of the experts retained by the defense at trial, only Dr. Cooke is qualified to test for brain damage. Dr. Sadoff and Dr. Gross are not qualified to do such testing themselves, but testified that they would have requested such testing if they had been presented with the records showing Petitioner's history of dysfunction and impairment.

experts, *brain damage testing would have been done* and *Petitioner's organic brain damage and other impairments would have been revealed and presented to the jury.* Because counsel failed to perform these rudimentary duties, the experts were not made aware of the need for brain damage testing, Petitioner was never tested for brain damage, and his severe mental health impairments went undiscovered and unpresented. Counsel were ineffective.

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d. Counsel failed to communicate with the mental health experts.

229. Trial counsels' failure to obtain any of the crucial background information, and their resulting failure to present it to the mental health experts, was compounded by their failure to communicate reasonably with the experts. Counsel did not discuss the appropriate legal standards with the experts, including the standards governing mitigating evidence; counsel did not communicate with the experts regarding the nature and purpose of their evaluations; counsel did not follow up on the experts' explicit suggestions for further investigation; and counsel simply *assumed* that brain damage testing would be done, but never asked the expert to do it, never asked if it was done, and, therefore, never realized that *it was not done.*

230. Counsels' failure to communicate reasonably with the experts is shown by the complete lack of communication between counsel and Dr. Gross about the nature and purpose of Dr. Gross's evaluation. While counsel thought that Dr. Gross was evaluating Petitioner for mitigation purposes, Dr. Gross, who has never prepared for or testified at the penalty phase of a capital case, believed that his evaluation was limited to possible guilt-phase

defenses, such as insanity. *See supra* (discussing testimony of Dr. Gross, Mr. Charles and Ms. Dantos). Since Dr. Gross was not looking for mitigation, he obviously was not in a good position to find it, as the Commonwealth's own "rebuttal" expert, Dr. Dattilio, testified. *See* Dattilio Deposition at 117. Counsel was ineffective.[24]

231. Counsel's failure to communicate with Dr. Gross also resulted in counsel's failure to recognize and understand one of the many indicia that Petitioner suffered a traumatic and abusive childhood. Dr. Gross' report noted that Petitioner had a history of antisocial behavior. In post-conviction, Dr. Gross testified that this history is a *strong indicator that Petitioner suffered from child abuse* – "in general, [antisocial behaviors] *are due to childhood experience in a very unhealthy family, and that causes the antisocial behavior.*" Gross Deposition at 19. Because of this, Dr. Gross explained, Petitioner's history indicates that he suffered an abusive childhood, and abuse should be carefully investigated and explored. *Id.* at 12-13; *see also supra* (discussing Dr. Gross' testimony).

232. Because counsel failed to communicate reasonably with Dr. Gross, counsel never learned of this

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[24] *E.g., Antwine v. Delo,* 54 F.3d 1357, 1366-67 (8th Cir. 1995) (counsel was ineffective at the penalty phase where he relied on mental health evaluation that was prepared for purposes of investigating guilt phase defenses); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir. 1989) (finding ineffective assistance of counsel where failure to present mitigating evidence resulted from misunderstanding between attorneys as to who was responsible for gathering mitigating evidence); *Baxter v. Thomas,* 45 F.3d at 1514 (finding ineffective assistance where failure to present mental health mitigating evidence resulted from counsel's mistaken belief that defendant had spent much of his youth in a juvenile detention facility, when it was actually a mental hospital).

connection between anti-social behavior and childhood trauma. As described above, counsel thought that Dr. Gross was looking for mitigation, but Dr. Gross did not know that counsel expected him to look for mitigation, and Dr. Gross did not look for mitigation. Moreover, Dr. Gross, who has never prepared for a capital sentencing hearing, *did not know that an abusive childhood is mitigating*:

> Q. *Are you aware* in your role as an expert in a forensic setting, *that an abusive childhood can be a mitigating circumstance in a capital case?*
>
> A. *No. I'm not aware of that.*

Gross Deposition at 28.

233. Thus, counsel's failure to appreciate the significance of Dr. Gross's report resulted from counsel's failure to communicate with Dr. Gross about the purpose of the evaluation; counsel's failure to discuss the meaning of Dr. Gross' report with him; and counsel's failure to inform Dr. Gross about the relevant law of mitigation.

234. Moreover, as described above, Dr. Gross' report also contains significant indicia that Petitioner's alcoholism should be investigated, and explicitly recommends that counsel further investigate Petitioner's history of alcoholism. Counsel failed to do any investigation, despite the report's specific urging that such investigation be done.

235. Similarly, counsels' failure to communicate reasonably with Dr. Sadoff resulted in that doctor having a legally incorrect understanding of the nature and scope of mitigating evidence. Dr. Sadoff testified that his understanding of mitigation is that it relates solely to the defendant's state of mind at the time of the offense:

> I have not in my experience used irrelevant material that had nothing to do with the crime itself as a mitigating factor. It had to be something that would have impacted on his state of mind at the time.

Sadoff Deposition at 39.

236. Dr. Sadoff's overly narrow conception of mitigation, however, does not comport with the broad definition of mitigation that the Eighth Amendment commands – "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). *See also Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (mitigation is anything that "might serve as a basis for a sentence less than death"; it need "not relate specifically to [the defendant's] culpability for the crime he committed") (quoting *Lockett*). Because counsel did not communicate effectively with Dr. Sadoff, and did not inform his of the proper legal standards, the doctor's misconceptions were never corrected and this potential witness failed to even consider a wide spectrum of potential mitigating evidence.

237. Counsels' failure to communicate reasonably with Dr. Cooke was especially prejudicial, since Dr. Cooke is the only one of the trial experts who could have tested Petitioner for brain damage. Sadoff Deposition at 13-15; Gross Deposition at 18.

238. Counsel testified in post-conviction that they *assumed* that Dr. Cooke would perform brain damage testing. NT 3/28/96 at 67-68 (Ms. Dantos); NT 3/29/96 at 43 (Mr. Charles: "When I sent Ron Rompilla to Dr. Cooke, I *expected that he would . . . test to determine if there was*

any brain damage."). However, counsel never actually *asked* Dr. Cooke (or anyone else) to do brain damage testing; counsel never *asked* the doctors if brain damage testing was actually done; and, in fact, *brain damage testing was not done*. Cooke Deposition at 7. Instead, Dr. Cooke testified, he did only a few incomplete tests that provided only "a rough estimate of intellectual function." *Id.*

239. If Dr. Cooke had done what counsel silently "expected that he would" do, brain damage testing would have been done, and Petitioner's brain damage would have been known to counsel and presented to the capital sentencing jury. Thus, counsels' failure to communicate reasonably with the trial mental health experts about the purpose, content and extent of their evaluations resulted in the failure to present the evidence of Petitioner's brain damage and other mental-health related mitigation. Counsel were ineffective for simply assuming something of such importance, and not taking any steps to be sure that their assumptions corresponded to reality.

e. Counsel failed to reasonably investigate Petitioner's traumatic childhood.

240. Counsel also rendered deficient performance when they failed to reasonably investigate, prepare and present the mitigating evidence of Petitioner's traumatic childhood and its lasting adverse effects.

241. The school, prison and court records that counsel ineffectively failed to obtain would have led effective counsel to the evidence of Petitioner's neglectful and abusive childhood. For example, Petitioner's school records explicitly state that school officials could obtain

"no cooperation" from his father in their attempts to help Petitioner, consistent with the dysfunctional home described in post-conviction; and Petitioner's juvenile court records explicitly refer to the extreme neglect, lack of supervision, parental alcoholism and instability in Petitioner's childhood home.

242. Moreover, the mental health experts, including the Commonwealth's "rebuttal" expert, Dr. Dattilio, agreed that Petitioner's school and prison records – with their mentally retarded IQ scores, low achievement test scores, special education placement, and abnormal MMPI test results – are consistent with, and indicators of, the abuse Petitioner suffered as a child, and show the need for careful and thorough investigation of Petitioner's childhood. *E.g.*, Dattilio Deposition at 70-73, 78-80. Counsel, however, failed to obtain any of these records and so was unaware of this evidence of Petitioner's traumatic childhood.

243. Counsels' failure to present the evidence of Petitioner's dysfunctional upbringing also resulted from their failure to reasonably communicate with the trial mental health experts. Dr. Gross noted in the report he provided to trial counsel that Petitioner had a history of antisocial behavior. Dr. Gross explained in post-conviction that such a history is typically "caused by *real, faulty dysfunctional family relationships,*" and *is a sign of Petitioner's dysfunctional and abusive childhood.* Gross Deposition at 19. Because counsel did not reasonably communicate with Dr. Gross, they never learned this significant fact about the meaning of Petitioner's history.

244. The Pennsylvania Supreme Court held that counsel were not ineffective with respect to child abuse

mitigation because "when they spoke to the family members before trial, none of the family members revealed abuse." *Commonwealth v. Rompilla,* 721 A.2d 786, 790 (1998). The Pennsylvania Supreme Court's conclusion is erroneous, for several reasons.

245. First, the above-described records, which would have been obtained by effective counsel, contain evidence of abuse and neglect that is independent of family members' testimony. Accordingly, if counsel had reasonably investigated the abuse and neglect would have been revealed irregardless of the information provided by the family.

246. Second, at least two of Petitioner's siblings were never interviewed by counsel at all. *E.g.,* NT 3/29/96 at 209-10 (Barbara Harris); NT 3/29/96 at 142, 156-57 (Randi Rompilla). Both of these siblings were available and would have testified about Petitioner's abusive and neglectful childhood if asked.

247. Finally, counsel did not recall asking Petitioner's family members any *specific* questions about abuse and neglect. *E.g.,* NT 3/28/96 at 109 (Ms. Dantos). Instead, counsel asked vague, general questions – *e.g.*, Was there "anything important or noteworthy about his family, upbringing?" *Id.* The Commonwealth's "rebuttal" expert, however, explained that *such general questions are inadequate* when inquiring about child abuse – because there is so much "denial" in abusive families, independent background information must be used along with very careful questioning. Dattilio Deposition at 106-07, 111; *see also* Gross Deposition at 16 (people who have suffered an abusive childhood are "usually reluctant to admit that their parents have hurt them physically"). Because counsel failed

to obtain the background records about Petitioner, and failed to communicate with the mental health experts, they never obtained the records and other information showing the presence of neglect and abuse in Petitioner's childhood home and the need for careful questioning and probing about the abuse.

248. Counsel did not do the needed background records investigation (which would have revealed the documentary evidence and indicators of child abuse and neglect); counsel did not communicate reasonably with the mental health experts (who would have told counsel that Petitioner's history is consistent with someone who has suffered abuse); and counsel did not speak to some family members; and counsel failed to confront the denial of other family members with documentary evidence of abuse and neglect. As a result of these failures, Petitioner's traumatic childhood was never revealed to the jury. Counsel were ineffective.

f. Counsel had no tactical or strategic reasons for their failures to investigate, develop and present mitigating evidence.

249. The significant mitigation presented post-conviction was readily available to trial counsel. Counsel, however, failed to present any of it to the jury, because counsel failed to reasonably investigate. Counsels' failure to present this mitigating evidence was not a strategic or tactical choice. To the contrary, counsel testified at the PCRA hearing that the mitigation presented post-conviction was the type of mitigation that *should have been presented* to the jury.

250. Moreover, even if counsel did claim to have a tactical or strategic reason for failing to present this mitigation, which they do not, given counsel's lack of investigation the failure to present the mitigating evidence *cannot* be deemed a "strategy" or "tactic," as a matter of law.[25] The failure to present this mitigating evidence

[25] *E.g.*, *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (counsel's failure to assert a possible defense can never "be characterized as 'strategy' " unless counsel has thoroughly investigated and done legal research regarding the defense); *United States v. Gray*, 878 F.2d 702, 711-12 (3d Cir. 1989) ("counsel can hardly be said to have made a strategic choice . . . when s/he has not yet obtained the facts on which such a decision could be made"; "Under [such] circumstances, counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence," and counsel is ineffective); *United States v. Bayne*, 622 F.2d 66, 69 (3d Cir. 1980) ("failure to investigate a critical source of potentially exculpatory evidence" cannot be characterized as "strategy"); *Baxter v. Thomas*, 45 F.3d at 1514 (decision not to investigate records relevant to defendant's background cannot be tactical; counsel, because of ineffectiveness in failing to read the records, was unaware of the content of the records); *Jackson v. Herring*, 42 F.3d 1350, 1350 (11th Cir. 1995) ("case law rejects the notion that a 'strategic' decision can be reasonably made when the attorney has failed to investigate his options and make a reasonable choice between them" (citing and quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991))); *Commonwealth v. Legg*, 551 Pa. 437, 711 A.2d 430, 434 (1998) ("Because counsel did not investigate . . . Appellant's mental history, we cannot agree with the Superior Court that he made a rational decision to avoid a diminished capacity defense."); *Commonwealth v. Perry*, 537 Pa. 385, 644 A.2d 705, 709 (1994) ("Failure to prepare is not an example of forgoing one possible avenue to pursue another approach [for tactical or strategic reasons]; it is simply an abdication of the minimum performance required of defense counsel."); *Commonwealth v. Mabie*, 467 Pa. at 474, 359 A.2d at 374 (counsel cannot reasonably "formulate strategy" until after counsel has reasonably investigated and is therefore aware of the essential facts).

Mr. Charles testified that he has a general policy against seeking prior records to investigate his client's functioning. Such a general policy against seeking out or reviewing potentially mitigating evidence

(Continued on following page)

resulted from counsel's failure to investigate fully and properly, not from strategic or tactical choice. "It was not that such [mitigating] information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons. The information was not presented . . . because *counsel never took the time to develop it.*" *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995). As such, counsels' failure to investigate, develop and present this evidence constituted deficient performance.

D. Conclusion.

251. Given the fundamental importance of mitigation in capital jurisprudence, defense counsel have clear constitutional obligations to investigate and develop mitigating evidence. Ineffective assistance of counsel is established where counsel fail to investigate, prepare and present mitigating evidence about the client's organic brain damage or other mental illness; where counsel fails to investigate, prepare and present the evidence about the defendant's traumatic childhood; *or* where counsel fails to investigate, prepare and present the evidence of the defendant's alcoholism. Here, counsel failed in all of these ways.

cannot be a reasonable strategy or tactic as a matter of law, "because those kinds of [tactical or strategic] decisions must be based on the specific facts of a case, not on a general policy." *Martinez-Macias v. Collins*, 810 F.Supp. 782, 811 (W.D. Tex. 1991) (citing *Crisp v. Duckworth*, 743 F.2d 580, 587 (7th Cir.1984); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir.1990); *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985); *Profitt v. Waldron*, 831 F.2d 1245, 1248-1249 (5th Cir. 1987)), *aff'd*, 979 F.2d 1067 (5th Cir. 1992) ("We affirm the judgment below for essentially the reasons stated by the . . . district court.").

252. Substantial mitigating evidence was available in this ease: Ronald Rompilla suffers from organic brain damage; the abuse he had to endure in childhood and his alcoholism exacerbated the deficits caused by his damaged brain; he suffered from an extreme mental and emotional disturbance and a substantially impaired capacity to conform his conduct to the requirements of law and understand his actions, throughout his life and at the time of the offense. The jury learned none of this. Counsel were ineffective and Petitioner is entitled to relief from his death sentence.

II. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND DEATH SENTENCE BECAUSE OF THE TRIAL COURT'S IMPROPER INSTRUCTIONS ON ACCOMPLICE LIABILITY.

253. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

254. During its guilt/innocence deliberations the jury asked the trial court: "If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?" NT 10/31/88 at 166. This jury question was the first time that the possibility of

* * *

III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE, EVEN AFTER THE JURY REPEATEDLY ASKED ABOUT PAROLE ELIGIBILITY; AND THE TRIAL COURT'S PROVISION, INSTEAD, OF INACCURATE AND MISLEADING INFORMATION, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

284. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

285. In Pennsylvania, a defendant convicted of first degree murder must be sentenced either to death or to life imprisonment. 42 Pa. C.S. § 9711; 18 Pa. C.S. § 1102(a)(1). Life imprisonment is statutorily defined as life *without possibility of parole.* 42 Pa. C.S. § 9756(c); 61 Pa. C.S. § 331.21; *Commonwealth v. Yount,* 419 Pa. Super. 613, 622, 615 A.2d 1316, 1320 (1992) (Pennsylvania law "unequivocally bars all parole for first degree murderers whether the sentence is life or death."), *app. denied,* 535 Pa. 634, 631 A.2d 1007 (1993); *Meyers v. Gillis,* 142 F.3d 664, 666-67 (3d Cir. 1998) (suggestion that defendant "would become eligible for parole sometime in the future [for] a crime that carried a mandatory period of life imprisonment as the only authorized sentence" was "grossly misleading"); *Christy v. Horn,* 28 F.Supp.2d 307, 314 n.13 (W.D. Pa. 1998) ("Under Pennsylvania law, a sentence of life imprisonment carries no possibility of parole."). Here, the trial court never provided this crucial sentencing information to the jury, and denied the jury this information even when the jury specifically requested it.

286. Petitioner's jury was never instructed that in Pennsylvania "life imprisonment" means life without possibility of parole. As described more fully below, unless they are instructed to the contrary jurors commonly belief [sic] that a "life" sentence *will* result in eventual parole; several factors in this case reinforced this commonly held belief; Petitioner's jury revealed, through several questions to the court, that it did not understand the meaning of its life sentencing option; the court did nothing to cure the jury's obvious confusion and misunderstanding; and the court's failure to properly instruct the jury under these circumstances violated a number of constitutional provisions.

Factual Background

287. Petitioner was sentenced to death by a jury that was never informed that, if it chose to sentence him to life imprisonment, he would be statutorily ineligible for parole. Instead, the trial court's initial instructions told the jury that it had the choice of sentencing Petitioner to death or "life imprisonment," *see* NT 11/1/88 at 16-17, 46-47; NT 11/2/88 at 53-69. The instructions did *not* define "life imprisonment" – they did not inform the jury that "life imprisonment" actually means "life *without possibility of parole,*" rather than some undefined term of years followed by eventual release. On the parole eligibility issue, then, the instruction amounted to "no instruction at all, . . . le[aving] the jury to speculate whether 'life imprisonment' means life without parole or something else." *Simmons v. South Carolina,* 512 U.S. 154, 166 (1994).

288. The United States Supreme Court has explained that there is a substantial and unacceptable risk

that the jurors will believe that *parole is available* from a "life imprisonment" sentence when – as here – the jury is told only that its sentencing options are death or "life imprisonment" and, without instruction on the meaning of "life imprisonment," is "left to speculate" as to its meaning. *Simmons,* 512 U.S. at 169-70 & n.9 (citing numerous authorities); *see also id.* at 177-78 (O'Connor, J., with Rehnquist, C.J. & Kennedy, J., concurring) ("common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole"); *State v. Henderson,* 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) (noting common misunderstanding "that a life sentence means 'five or six' years or some other erroneously conceived period of time"); Paduano & Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty,* 18 COL. HUM. RTS. L. REV. 211, 211 (1987) ("[T]he typical juror at the sentencing phase of a capital trial perceives the imposition of a sentence of 'life imprisonment' to mean there is a good chance that the capital defendant will in fact be released from prison on parole.") (hereinafter *Deathly Errors*); Bennack, *The Public, the Media and the Judicial System,* 7 STATE CT. J. 4, 10 (1983) (70 percent of Americans in national survey believed that criminals sentenced to "life imprisonment" would not spend rest of life in prison).

289. Similarly, *the trial judge in this case* explicitly recognized what the Supreme Court and numerous studies have found – *jurors commonly believe that a sentence of "life imprisonment" allows parole.* The trial court, however, made no effort to correct this misunderstanding. Instead, when defense counsel complained to the trial court that, "[b]ecause of the misconceptions, *a lot of people think that if you get a life sentence, you're out in five (5) years or three*

(3) years," the court simply threw up its hands and responded, *"I can't stop that."* NT 11/2/88 at 72. As a result, the jury was never instructed on this critical matter.

290. Going hand-in-hand with the widespread mistaken belief that a "life" sentence will lead to parole, jurors commonly fear that the defendant's parole from a "life" sentence will create a danger to the community. The United States Supreme Court has recognized "that a defendant's future dangerousness bears on *all* sentencing determinations made in our criminal justice system." *Simmons,* 512 U.S. at 162 (citing *Jurek v. Texas,* 428 U.S. 262, 275 (1976); *California v. Ramos,* 463 U.S. 992, 1003, n.17 (1983)). Similarly, the Pennsylvania Supreme Court has stated that "the threat of danger the defendant poses to the community" is "[a]n integral part of the jury's determination whether a defendant should be sentenced to death." *Commonwealth v. Chester,* 526 Pa. 578, 602, 587 A.2d 1367, 1379 (1991).

291. Obviously, "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant" and the sentencing jury will naturally "view a defendant who is eligible for parole as a greater threat to society than a defendant who is not." *Simmons,* 512 U.S. at 163. Thus, mistaken beliefs about parole eligibility, together with the fears that such a mistaken belief engenders, "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." *Brown v. Texas,* 118 S. Ct. 355, 356 & n.2 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., respecting denial of certiorari) (poll data shows that information about non-eligibility for parole would have a significant impact on jurors' capital sentencing decisions, making death sentence less likely).

292. These generally acknowledged, common sense principles – (1) that reasonable jurors would not have understood the initial instruction provided in this case to have meant "life imprisonment without parole," and (2) that Petitioner's imagined parole-eligibility would have weighed heavily in the jurors' sentencing decision – unquestionably applied to the jury's sentencing determination in this case. Indeed, the record of this case clearly reflects the sentencing jury's ignorance of the true meaning of "life imprisonment"; its related concern that Petitioner would pose a danger to the community if sentenced to "life"; and the importance it attached to these matters in the sentencing decision.

293. The jury was pervasively exposed to, and focussed on, Petitioner's supposed parole eligibility and future danger to the community during the capital sentencing hearing. During that hearing, the jury learned that: (1) at the time of this homicide Petitioner had been released on parole from his earlier conviction, NT 11/2/88 at 5, 8, 20, 23, 26, 28; (2) there is a lack of rehabilitative services for prisoners and parolees, *id.* at 20, 23; (3) Petitioner has a hard time adjusting to life outside prison when he is on parole, *id.* at 11, 20, 23-24; and (4) Petitioner was arrested for this offense just three months after having been released from prison on parole from his prior offense, *e.g., id.* at 12-13. All of these matters inevitably evoked and reinforced the widespread, "common sense" belief that "parole [is] a mainstay of state and federal sentencing regimes," and that "every term (whether a term of life or a term of years) in practice [is] understood to be shorter than the stated term." *Simmons,* 512 U.S. at 169-70. As a result, this evidence inevitably focussed the

jury on the possibility that Petitioner would pose a serious danger to the community if ever again released on parole.

294. The prosecution's penalty phase evidentiary presentation and argument also injected into the case the specter of parole and the supposed danger Petitioner posed to society if released.

295. The prosecution offered as an aggravating circumstance that Petitioner had "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. C.S. § 9711(d)(9). As the United States Supreme Court has explained, this inevitably made his future dangerousness an issue in the case. *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986) ("Consideration of a defendant's *past conduct as indicative of his probable future behavior* is . . . *inevitable.*").[26] Petitioner's jury, upon hearing of his history of felony convictions – especially a history that it found to be "significant" and involving "violence to the person" – would have assumed that Petitioner was prone to commit crimes of violence in the future.

[26] This "inevitability" – that a jury will infer general criminal tendencies and future danger from a history of prior violent convictions is the reason that use of prior "bad act" evidence and prior criminal history is usually limited by evidentiary rules and must be accompanied, when it is used, by strict cautionary instructions. *See, e.g.,* Fed.R.Evid. 404(b) (evidence of "other crimes, wrongs, or acts" not admissible unless offered for limited, specified purposes); Fed.R.Evid. 609 (use of evidence of conviction of crime for impeachment); *Commonwealth v. Zabala,* 310 Pa. Super. 301, 456 A.2d 622, 631 (1983) (admission of prior crimes evidence must be carefully controlled because it "suggest[s] an accused's propensity for crime"); *Commonwealth v. Stanley,* 265 Pa. Super. 194, 401 A.2d 1166, 1174 (1979) (same), *aff'd,* 498 Pa. 326, 446 A.2d 583 (1982).

296. This is especially so because a jury can properly find the "significant history" aggravating circumstance only "in cases where the prior history of convictions shows the defendant has *pronounced recidivistic tendencies.*" *Commonwealth v. Holcomb,* 500 Pa. 425, 498 A.2d 833, 851 (1985). For all of these reasons, the jury's concern with Petitioner's future dangerousness was *intrinsic* to its consideration and finding of the "significant history" aggravating circumstance.

297. The jury's fear of Petitioner's future dangerousness was further guaranteed by the particular manner in which the prosecutor presented and argued Petitioner's prior convictions.

298. As described in more detail elsewhere in this Petition, the prosecution presented as the centerpiece of its penalty phase case-in-chief the inflammatory testimony of the victim of a prior rape and burglary committed by Petitioner. This evidence was intended to show the jury that the prior offense was brutal, involving the rape, robbery and knife-slashing of an elderly woman that had occurred over the course of one hour. *See* NT 11/1/88 at 64-98.

299. Both the frightening violence of the prior offense and the claimed similarity between it and this case were then highlighted by the prosecutor during his penalty phase summation:

> You heard testimony, that in 1974, the Defendant was convicted of the crime of Rape and Burglary, and you heard some testimony of that case . . . Joe MaCrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point. . . . *[I]sn't it frightening, the similarity between that*

> *case and this case.* I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. *Isn't it frightening the similarities in those crimes.* Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. *Its absolutely frightening to think of the similarities in those two crimes.*

NT 11/2/88 at 50-51.

300. The prosecutor's emphasis on alleged similarities between the prior offenses and this offense served to highlight the implication – intrinsic to the "significant history" aggravating circumstance – that Petitioner has "pronounced recidivist tendencies" that would create significant danger to the community if he was ever released on parole. *Holcomb,* 498 A.2d at 852 (history of convictions most strongly indicates "pronounced recidivist tendencies" "where the defendant shows a willful and persistent refusal to curb a propensity towards *a particular type* of *violent aggression* against others"); *Stanley,* 401 A.2d at 1174 (jury is especially likely to infer recidivist tendency from prior convictions "when the jury is informed that the defendant's prior crime was the same as one of the crimes for which he is currently being tried"). Indeed, it is precisely these supposed recidivist tendencies toward violent crime that the prosecutor stressed made Petitioner's actions "absolutely frightening."

301. The prosecutor further stressed Petitioner's future dangerousness when he argued that Petitioner "learned a lesson" from his prior convictions that made

him even more dangerous. NT 11/2/88 at 51. According to the prosecutor:

> That lesson was, don't leave any witnesses. Don't leave anybody behind who can testify against you. Don't leave any eye witnesses. . . .

NT 11/2/88 at 51.

302. This evidence and argument painted for the jury a picture of Petitioner as a hardened, frightening, recidivist who, if he was ever released, would commit additional violent crimes and would not "leave any witnesses." There is no question that this was an argument for future dangerousness.

303. Given all of the above – *e.g.,* the widely held belief that a "life" sentence can lead to parole; the recognition by the trial judge in this case that these jurors might be harboring such mistaken beliefs; this jury's exposure to extensive evidence and argument regarding Petitioner's prior release on parole, his violent behavior under such conditions and the danger he would pose if ever again released – it is reasonable to assume that Petitioner's possible parole eligibility and the resulting danger to the community if he were sentenced to life imprisonment were among the jury's central concerns. At the very least, there was a "reasonable likelihood" that these matters improperly affected the jury's sentencing decision. *Simmons,* 512 U.S. at 170 (quoting *Boyde v. California,* 494 U.S. 370, 380 (1990)).

304. In most cases, "[t]here is, of course, no extrinsic evidence of what the jury . . . actually thought" about during its deliberations, and a reviewing court must rely upon "common sense" and reasonable inferences to determine if

jury may have "conducted its task improperly." *Mills v. Maryland,* 486 U.S. 367, 381, 383-84 (1988). By itself, the lack of instruction and the prosecutor's sentencing stage evidence and argument made it reasonably likely that the jury considered the possibility of parole and future danger to the community in its sentencing calculus. But this Court need not infer what the jury might have been thinking – the jury made obvious its concern with the possibility of parole, and the importance of that concern to its sentencing decision, by *repeatedly interrupting its deliberations to ask parole – and future dangerousness-related questions.*

305. After approximately two hours of sentencing deliberations, the jury asked the following question:

> If a life sentence is imposed, is there any possibility of the defendant ever being paroled?

NT 11/2/88 at 73. The question unequivocally establishes that *this jury was not aware of the meaning of "life imprisonment"* in Pennsylvania and at least some jurors believed that a life-sentenced prisoner would be parole-eligible. *See Simmons,* 512 U.S. at 160, 170 n.10 ("It almost goes without saying that" when a capital sentencing jury interrupts its deliberations to ask "Does the imposition of a life sentence carry with it the possibility of parole?", the jury does not know that "life" means life without possibility of parole; otherwise, "there would have been no reason for the jury to inquire").

306. Trial courts have a duty to answer such questions posed by a deliberating jury – "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States,* 326 U.S. 607, 612-13 (1946). Here, explicitly faced with such

difficulties, the court did not clear them away. Instead, the jury "was denied a straight answer about petitioner's parole eligibility even when it was requested." *Simmons,* 512 U.S. at 165-66.

307. Rather than correct the jurors' obvious confusion and misunderstanding about the meaning of "life imprisonment" by accurately instructing the jury that it means life without possibility of parole, the trial court responded:

> I'm sorry to say, *I can't answer that question.* That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right . . .

NT 11/2/88 at 73-74.

308. The trial court's response obviously failed to correct the jury's confusion. Since at least some jurors believed parole would be available from a life sentence – hence the question – and since the court did nothing to cure that belief, it is entirely clear that the jury's deliberations were infected by this misunderstanding.

309. Indeed, to the extent that the court's non-response had any effect at all on the jury, it piled more error upon the jury's admitted ignorance about the meaning of "life imprisonment" – the court's response, especially when considered in context with other instructions and

events at the trial and sentencing proceedings, improperly suggested that a life-sentenced prisoner *is* parole-eligible.

310. The jury was initially instructed that its sentencing options were "life imprisonment" or death. Thus, when the court responded to the jury's question by saying "if there were *other alternatives* that you should consider, we would have outlined them in the Charge," NT 11/2/88 at 74, the jury was necessarily left with the impression that life without parole was an "other alternative" to the sentencing options on which it was instructed – death or "life imprisonment." In other words, the "life imprisonment" sentencing option was something *different* from life without parole. *E.g.*, *Fontenot v. State,* 881 P.2d 69, 74 n.2 (Okla. 1994) (life without parole is intermediate sentence between life sentence and death). The court's response thus implied that if the jury sentenced Petitioner to "life imprisonment" rather than death he would be parole-eligible.

311. The jury was already predisposed, by earlier prosecutorial arguments and evidentiary presentation and by the general context of this capital proceeding, to interpret the court's response in this manner. All jurors are aware that a criminal trial includes many procedural and evidentiary practices that are designed to protect the defendant's rights. Throughout the trial and sentencing proceedings, the jurors were aware of sidebar conferences and other proceedings that were designed to keep prejudicial information from them. In the penalty phase itself, after the prosecutor introduced the evidence of Petitioner's prior convictions he told the jury: "You learned some things you didn't know before, some *things that we weren't permitted to tell you in the Trial* but now you know those things." NT 11/2/88 at 45; *see also* NT 11/1/88 at 48-49

(prosecutor: "Now I am permitted to tell you" about Petitioner's prior convictions; "I was not permitted to tell you about that earlier"). Thus, the jurors knew that information had been concealed from them in order to protect Petitioner – including the highly prejudicial evidence of Petitioner's prior criminal record.

312. In this context, the trial judge's response to the jury's question about parole eligibility – *"I'm sorry to say, I can't answer that question."* NT 11/2/88 at 73 – appears to be yet another artifice protecting the defendant by refusing to give the jury information regarding his parole eligibility. Under these circumstances, the jury would reasonably infer that the judge "can't answer" its simple, straightforward question for the same reasons that the jury could not listen in on the sidebar conferences or the prosecutor was not "permitted" to introduce Petitioner's criminal history – because of technical legal rules *protecting the defendant.* The jury would thus naturally assume that the "truth" about life imprisonment is that parole *is* available but that this "truth" is being withheld from them.

313. Moreover, another reasonable interpretation of the judge's remarks is that the judge and jury simply have no control over whether parole is available – the jury could reasonably infer that the judge "can't answer" its question about parole availability because such decisions would be made by others. Thus, again, the clear implication arising from the court's non-response is that *parole is available.*

314. Following the court's misleading and inaccurate response to the jury's question about the availability of parole, the jury further expressed its concern with possible

parole by asking the trial court *more parole-related questions.*

315. After approximately nine hours of deliberations, the jury again interrupted its deliberations and asked the trial court to provide it Commonwealth "Exhibits 1 and 2 from the Sentencing Hearing," NT 11/2/88 at 89 – *i.e.*, the docket entries that the Commonwealth had introduced, through the Lehigh County Clerk of Courts, as part of its evidence showing that Petitioner had been convicted and sentenced for the prior offenses that made up his "significant history" of felony convictions. *See* NT 11/1/88 at 52-54 (introducing Commonwealth Exhibits 1 & 2). The trial court told the jury that "*we can't show them to you.*" NT 11/2/88 at 90.

316. When the court informed the jury that they could not see the docket entries on the prior convictions and sentences, the jury foreman explained that the jury wanted to see the docket entries because it wanted to know "the length of the sentence" on the prior convictions; if that sentence "was commuted in any way"; and if Petitioner "got released on behavioral [sic]." NT 11/2/88 at 94. The court responded that *it could not give them any of that information, id.* at 94-95, and the prosecutor, in front of the jury, said to the judge: "*You can't tell them.*" *Id.* at 95. Again, the jurors were given the impression that *parole-related matters were being withheld from them.*

317. After ten hours of deliberations, the jury was released for an overnight recess. The following morning, after another hour of deliberations, the jury sent out another question:

> Was the Defendant offered any type of rehabilitation either while in prison or after his release from prison?

NT 11/3/88 at 3, 7.

318. The trial court responded:

> THE COURT: Well, I'm sorry to say. I can't answer that. I can only tell you that you're going to make your decision based upon the evidence that was presented and in accordance with the Law with respect to the Sentencing Hearing. First of all, I couldn't even answer it if I wanted to or if I could, I don't know.
>
> THE FOREMAN: Could I change the question to the point that is – *isn't rehabilitation available in prison?*
>
> THE COURT: Well, again, I would like to even answer that, and I can't. *You're going to have to rely upon your own knowledge* of that aspect if indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be frank with you, is not an issue before – before you with respect to the Law that it's a decision – that you must make. I can understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find. All right. Very well, then, the Jury's excused to return to deliberate, very good.

NT 11/3/88 at 7-8.

319. Finally, after approximately fourteen hours of deliberations, the jury returned a death sentence. NT 11/3/88 at 19.

320. These jury questions and this colloquy demonstrate that the jury's deliberations were influenced by the related concerns of parole eligibility; Petitioner's ability or inability to be "rehabilitated" in prison; and Petitioner's possible future dangerousness.

321. The jury's concern with the availability or unavailability of "rehabilitation" shows that the jury was concerned about Petitioner's future dangerousness. If rehabilitation was *not* available in prison, Petitioner would present a future danger because he would not be "rehabilitated" before his release. If rehabilitation *was* available, the jury would still have to come to grips with future dangerousness, since Petitioner had apparently not benefitted from available rehabilitation during his prior, lengthy incarceration. The court's response – that the jury should "rely upon your own knowledge" of the "penology system" – simply urged the jury to rely on the unbridled, uninstructed speculation about parole eligibility that the *Simmons* Court condemned. *See Simmons*, 512 U.S. at 170 (instruction that jury should rely on its own knowledge of parole eligibility "does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment' ").

322. Due process and the Eighth Amendment are violated when a capital sentencing jury is unguided in its consideration of the meaning of life imprisonment, "le[aving] the jury to speculate whether 'life imprisonment' means life without parole or something else." *Simmons*, 512 U.S. at 166. Here, the jury's speculation about the

meaning of life imprisonment was worse than *unguided* – it was *misguided* by instructions implying that "life imprisonment" carries with it the possibility of parole. This result was a death sentence that violated Petitioner's Sixth, Eighth and Fourteenth Amendment rights, for a number of reasons explained more fully below.

The Constitutional Violations

A. The Failure to Provide a Life Without Possibility of Parole Instruction Violated Petitioner's Due Process Rights.

323. The trial court's failure to provide the jury with an instruction that a life sentence in Pennsylvania means "life without possibility of parole" constituted four distinct and independent violations of Petitioner's due process rights: (1) it violated the clear command of *Simmons v. South Carolina*, which required that the jury be instructed that life imprisonment means life without possibility of parole; (2) it violated the due process proscription against being sentenced to death based upon information the defendant had no opportunity to rebut or explain (*Gardner v. Florida*; *Skipper v. South Carolina*); (3) it violated the due process proscription against sentences imposed by a sentencer acting under a material misapprehension of law or fact relating to the sentencing decision (*Townsend v. Burke*, *United States v. Tucker*); and (4) it violated Petitioner's due process liberty interest to sentencing by a jury deciding between the choices of life without possibility of parole and death (*Hicks v. Oklahoma*).

1. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process protections under *Simmons v. South Carolina*.

324. In a capital case, "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156. As described above, Petitioner's future dangerousness unquestionably and "inevitably," *Skipper*, 476 U.S. at 5, was at issue in this case. The jury was never informed of Petitioner's ineligibility for parole and, instead, was misinformed about this issue. Accordingly, Petitioner's due process rights were violated and he is entitled to relief from his death sentence.

2. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process protections against being sentenced to death based upon inaccurate information he had no opportunity to rebut or explain concerning his supposed parole eligibility.

325. Due process prohibits the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *Skipper v. South Carolina*, 476 U.S. 1 (1986). Here, Petitioner was sentenced to death by a jury that was never informed that he would be parole ineligible if sentenced to life; and it is clear that at least some jurors believed

Petitioner would be parole eligible. The jury's improper exposure to Petitioner's supposed parole-eligibility in fixing his sentence at death, without affording him any opportunity to deny or explain that prejudicial misinformation, violated his due process rights.

3. The failure to provide a life without possibility of parole instruction violated Petitioner's due process rights by subjecting him to a sentence imposed on the basis of inaccurate information that was material to the sentencing decision.

326. Due process is violated when a defendant is sentenced on the basis of inaccurate information that is material to the sentencing decision. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Roberts v. United States*, 445 U.S. 552, 556 (1980); *United States v. Levy*, 865 F.2d 551, 559-60 (3d Cir. 1989) (en banc) (vacating sentence imposed because "sentencing on the basis of materially untrue assumptions violates due process"); *United States v. Kerley*, 838 F.2d 932, 940 (7th Cir. 1988) ("a sentence predicated on misinformation cannot stand"); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987) ("It is well established that . . . material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."); *United States v. Ruster*, 712 F.2d 409, 412 (9th Cir. 1983) (due process violated when sentencer "relies on materially false or unreliable information in sentencing a defendant").

327. This proscription applies whether the sentencer is a judge (*e.g.*, *Townsend*) or, as here, a jury (*e.g.*, *Hicks*). *Johnson v. Rosemever*, 117 F.3d 104, 112 (3d Cir. 1997).

328. In particular, a sentence violates due process when it may have been imposed under a misapprehension of law concerning a defendant's eligibility for parole or a material misunderstanding concerning the fact of a defendant's parole ineligibility. *Levy*, 865 F.2d at 560 (sentence reversed when the sentencer may have imposed a harsher sentence because he incorrectly believed the defendant would be eligible for parole); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987) (sentencing judge's incorrect understanding of defendant's minimum statutory parole eligibility date deprived defendant of due process at sentencing); *United States v. Stewart*, 779 F.2d 538, 541 (9th Cir. 1985) (Kennedy, J.) (sentence under pending criminal enterprise statute vacated when sentencer "may have acted on mistaken advice from the Government that sentencing defendant to life imprisonment without possibility of parole would not necessarily preclude his eventual parole release"); *cf. Meyers v. Gillis*, 142 F.3d 664, 666-67 (3d Cir. 1998) (trial counsel's advice that defendant "would become eligible for parole sometime in the future despite pleading guilty to a crime that carried a mandatory period of life imprisonment as the only authorized sentence" was "grossly misleading").

329. Moreover, the defendant is not required to prove "actual reliance [by the sentencer] on the erroneous information" concerning parole eligibility. *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987). Instead, the sentence should be vacated when the sentencer "*may have relied* on misinformation" suggesting that the defendant could be eligible for parole. *Stewart*, 779 F.2d at 541; *see also*

United States v. Levy, 865 F.2d at 560 (3d Cir.) (en banc) (reversal required when there was an "unacceptable risk" that the sentence was "the result of a misconception" that the defendant would be eligible for parole); *King*, 825 F.2d at 724 (sentence set aside when the sentencer's "reliance on an improper factor [the defendant's supposed parole eligibility] was 'quite probable' ").

330. Here, for all of the reasons stated above, it is clear that the sentencing jury actually did rely upon misinformation concerning parole eligibility. At the very least, there is an unmistakable and unacceptable risk that the jury relied upon such misinformation.

331. Because life without possibility of parole is a "radically different third alternative" from sentences of "life" and "death," *Salazar v. State*, 852 P.2d 729, 744 (Okla. 1993) (Johnson, J., specially concurring), this jury's deliberations were based upon a prejudicially inaccurate view of its sentencing options *See also Brown v. Texas*, 118 S. Ct. 355, 356 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., respecting denial of certiorari) (failing to explain to the capital sentencing jury that a defendant if sentenced to life would be ineligible for parole for 35 years "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose").

332. Moreover, even if the jury were not conclusively presumed to have misunderstood its sentencing options, Pennsylvania's requirement that a death-sentence be unanimous and the risk that at least *one* juror *may have* imposed death believing that the alternative sentence was life with parole, establishes that the court's failure to instruct the jury that "life" means "life without possibility

of parole" violated due process. *E.g.*, *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Levy*, 865 F.2d 551, 559-60 (3d Cir. 1989) (en banc); *United States v. Kerley*, 838 F.2d 932, 940 (7th Cir. 1988) (Posner, J.); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987); *United States v. Stewart*, 779 F.2d 538, 541 (9th Cir. 1985) (Kennedy, J.).

4. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process liberty interest in having his punishment fixed by a jury that would choose between the lawful sentencing options of "life without possibility of parole" and "death."

333. The failure to instruct the jury that its sentencing options were life without possibility of parole and death also violated due process by denying Petitioner his due process liberty interest in having his punishment fixed by a jury that would choose between the legally mandated sentencing options of death and life without possibility of parole.

334. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the defendant's state-created liberty interest in having the jury select his sentence from the full range of alternatives available under state law. The United States Court of Appeals for the Fifth Circuit has succinctly summarized the holding in *Hicks* in terms especially applicable here: to establish a valid *Hicks* claim, the defendant must show "that the sentencing authority

lacked knowledge and understanding of the range of sentencing discretion under state law . . . [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of the less severe sentencing options." *Dupuy v. Butler*, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted).

335. By statute in Pennsylvania, a convicted capital defendant is entitled to have his punishment fixed by the jury in "a separate sentencing hearing *in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment*." 42 Pa. C.S. § 9711(a)(1). As explained above, the term "life imprisonment" as used in Pennsylvania's capital sentencing statute means "life without possibility of parole."

336. The jury in this case had the duty to consider whether the evidence properly introduced in the sentencing proceedings was aggravating or mitigating in light of the available sentencing options. Had the jury been correctly instructed, it then would have had the discretion to return a sentence of life without possibility of parole.

337. If only one juror, after weighing the aggravating and mitigating evidence in this case, decided that the defendant should be sentenced to "life without possibility of parole" instead of death, the court would have been required to impose a life sentence. 42 Pa. C.S. § 9711(c)(1)(iv). There is a substantial possibility in these circumstances that at least one juror would have voted for a sentence of life without parole had the jury been accurately instructed as to its sentencing obligations under Pennsylvania law.

338. Petitioner's liberty interest in the exercise of jury discretion to fix his punishment between life without

possibility of parole and death was arbitrarily denied when accurate and material information concerning the jury's sentencing options – that the life sentence-option carried with it automatic ineligibility for parole – was withheld from the jury, and the jury instead was forced to choose between the undefined alternatives of death and life.

339. This arbitrary denial violated Petitioner's due process rights under the Fourteenth Amendment, because Petitioner's right to have a jury exercise its discretion to fix his punishment between life without possibility of parole and death vested in him a constitutionally protected liberty interest in a sentence resulting from the exercise of that discretion. *Toney v. Gammon*, 79 F.3d 693, 699-700 (8th Cir. 1996) (where court had discretion under MO. REV. STAT. § 558.026.1 to sentence sex offender to either consecutive or concurrent sentences for crimes of a sexual nature committed at the same time, the statute created "a constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State"); *Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995) (NEV. REV. STAT. § 207.010, requiring trial court to make particularized findings under habitual offender statute creates liberty interest in that sentencing procedure); *Fetterly v. Paskett*, 997 F.2d 1295, 1299-1300 (9th Cir. 1993) (IDAHO CODE § 19-2515(c) created liberty interest in capital sentencing procedures requiring jury to balance mitigating circumstances (collectively) against each aggravating circumstance (individually)); *Rust v. Hopkins*, 984 F.2d 1486, 1492-93 (8th Cir. 1993) (NEB. REV. STAT. § 29-2523 created liberty interest in consideration of

aggravating circumstances based on proof beyond a reasonable doubt, and § 29-2525 creates liberty interest in appellate review based upon statutory standards); *see also Stephany v. Wagner*, 835 F.2d 497, 500 (3d Cir. 1987) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (state laws that contain particularized standards and criteria guiding state officials create protected liberty interests)).

340. Having statutorily mandated a capital sentencing choice between life without possibility of parole and death, and having provided the defendant the right to capital sentencing by a jury that must exercise discretion in choosing between the statutory sentencing options, Pennsylvania must follow the dictates of its own law, or violate due process. *Hicks*, 447 U.S. at 346-47; *Wolff v. McDonald*, 418 U.S. 539, 557 (1974); *see Fetterly*, 997 F.2d at 1300 ("There is, of course, nothing in the Constitution of the United States that requires Idaho's legislature to approach [capital sentencing] as it has done. . . . However, the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."); *Foster v. Delo*, 39 F.3d 873, 882 (8th Cir. 1994) ("Where a state creates a right, such as a defendant's right to a review of his sentence, the Fourteenth Amendment of course entitles him to procedures to ensure that the right is not arbitrarily denied.").

B. The Failure to Provide a Life Without Possibility of Parole Instruction Presented the Jury with a False Choice of Sentencing Options, Denied Petitioner the Heightened Procedural Safeguards Required in Capital Cases, and Produced an Arbitrary and Capricious Sentence that Violated His Rights Under the Eighth Amendment.

341. A sentence of death is "cruel and unusual" in violation of the Eighth Amendment if arbitrary and capricious factors come into play at the sentencing proceeding. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

342. The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. *Simmons v. South Carolina*, 512 U.S. at 172 (Souter, J. concurring). Because of the unparalleled severity and irreversibility of the death penalty, the Eighth Amendment imposes a heightened standard for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *see also Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980); *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988).

343. This heightened need for reliability requires the provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing

determination," *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

344. As part of the requirement that capital juries must receive accurate sentencing information, the jury must be properly instructed as to all material elements in its sentencing-stage deliberations, including the meaning of legal terms such as "life imprisonment." *See Walton v. Arizona*, 497 U.S. 639, 647 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."); *see also Simmons*, 512 U.S. at 172 (Souter, J., concurring) ("That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives."); *Russell v. State*, 607 So. 2d 1107, 1118 (Miss. 1992) ("The knowledge that the alternative to death is a life sentence, without the possibility of probation or parole is the type relevant and accurate sentencing information to which our cases speak and which every jury faced with the determination of life or death is entitled to consider."); *cf. Commonwealth v. Peterkin*, 513 A.2d 373, 379, 511 Pa. 299, 311 (1986) (justifying excusing juror for cause when juror understood sentencing option of "death" to mean "a term," used to give life imprisonment[,] evinc[ing] a misunderstanding of the law which could have led him to misapply the court's instructions").

345. It is undisputable that the possibility of parole is a material fact to capital sentencing juries. Accordingly, when the actual sentencing options faced by a capital sentencing jury are life without possibility of parole and

death, but the jury is not informed that life means "life without possibility of parole," the jury is denied "accurate information regarding petitioner's parole ineligibility." *Simmons*, 512 U.S. at 162. As a result, the jury is presented with "a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration," and is left with a "grievous misperception" of its sentencing options. *Id.* at 161-62.

346. Moreover, the sentencing option is not only materially inaccurate, but the absence of a life without parole instruction results in "harsher penalty options," *Fontenot v. State*, 881 P.2d 69, 74 n.2 (Okla. 1994) (reversing death sentence where jury informed of sentencing choices of life or death, but not informed of intermediate option of life without possibility of parole),[27] and "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." *Brown v. Texas*, 118 S. Ct. at 356; *cf. Commonwealth v. Peterkin*, 513 A.2d 373, 379, 511 Pa. 299, 311 (1986) (sustaining challenge to venireman for cause when juror "expressed his view that the death penalty is an academic question since it is not carried out"; juror's response "that he was in favor of the death penalty as a term used to give life imprisonment

[27] *See also Taylor v. State*, 1995 WL 571320, *25 (Miss. Sept. 28, 1995) ("Had the jury in the present case been informed that Taylor, as an habitual offender, would not have the opportunity for parole, they might have opted for life imprisonment rather than imposing the death penalty."); *State v. Henderson*, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) ("We cannot believe that, had the jury known ahead of time that a life sentence actually meant a minimum of twenty-five years and nine months (assuming all meritorious deductions), plus another thirty years before Henderson even would be eligible for parole, it would not have been more likely to impose a life sentence instead of a death sentence.").

evinced a misunderstanding of the law which could have led him to misapply the court's instructions, possibly to the defendant's prejudice").[28]

347. By failing to provide a life without possibility of parole instruction, the trial court "effectively withh[olds] from the jury the life-without-parole alternative, [and] . . . diminish[es] the reliability of the jury's decision that death, rather than that alternative, was the appropriate penalty in this case." *Simmons*, 512 U.S. at 174 (Souter, J., concurring). The resulting sentence "should be vacated as having been 'arbitrarily or capriciously' and 'wantonly and . . . freakishly imposed.'" *Id.* at 173 (quoting *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring); and *Id.* at 310 (Stewart, J., concurring)).[29]

[28] *See also Deathly Errors, supra*, 18 COL. HUM. RTS. L. REV. at 212 ("The option of life to a typical juror means disproportionately little punishment for the convicted capital murderer. A juror, then, laboring under the misperception that a sentence of 'life' is a ticket to 'get out of jail free' on parole, feels constrained to vote for a penalty of death.").

[29] *See also Tate v. State*, 896 P.2d 1182, 1193 (Okla. 1995) (death sentence imposed by a jury that has not been informed that one of its sentencing options is life without possibility of parole "renders the sentencing stage fundamentally unfair"); *Fontenot v. State*, 881 P.2d 69, 74 (Okla. 1994); *Humphrey v. State*, 864 P.2d 343, 344 (Okla. 1993); *Hain v. State*, 852 P.2d 744, 753 (Okla. 1993); *Salazar v. State*, 852 P.2d 729 (Okla. 1993); *Taylor v. State*, 1995 WL 571320, *25 (Miss. Sept. 28, 1995) (overturning death sentence when capital sentencing jury not instructed that "life" sentence for defendant adjudicated as an habitual criminal meant "life without possibility of parole"); *Russell v. State*, 607 So. 2d 1107, 1118 (Miss. 1992); *Ladner v. State*, 584 So. 2d 743, 759 (Miss. 1991); *Mackbee v. State*, 575 So. 2d 16, 38-41 (Miss. 1990); *Berry v. State*, 575 So. 2d 1, 13 (Miss. 1990); *Turner v. State*, 573 So. 2d 657, 674 (Miss. 1990); *State v. Henderson*, 109 N.M. 655, 658-59, 789 P.2d 603, 606-07 (1990) (vacating death sentence on eighth amendment grounds when jury had not been instructed that a person sentenced to life imprisonment in New Mexico would be ineligible for parole for

(Continued on following page)

348. Moreover, a death sentence must be vacated even if the jury instructions are "technically flawless," when questions posed by the jury indicate that jury does not understand the law and the trial court fails to correct that misunderstanding. *McDowell v. Calderon*, 130 F.3d 833, 838 (9th Cir. 1997) (en banc). Given the questions the jury asked in this case, the death sentence would have to be vacated under the Eighth Amendment even if the trial court's initial instructions – that the jury's sentencing options were "life imprisonment" or "death" – had been adequate.

349. Here, "as of the moment of the delivery of the note" inquiring about parole eligibility, the jurors who believed parole might be available "were outside the channel established by state law as required by the Eighth and Fourteenth Amendments." *McDowell*, 130 F.3d at 838. The risk created by this legal derailment was that they would impose the death penalty 'in spite of factors which . . . [might] call for a less severe penalty.'" *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Under these circumstances, the trial court's failure to correct the jurors' expressed "confusion regarding the law" created an unacceptable risk that the sentence was based upon improper grounds, and violated the Eighth Amendment. *McDowell*, 130 F.3d at 838-40.

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thirty years, and that, in this particular case, the defendant would not be eligible for parole for at least fifty-five years).

C. The Failure to Provide a Life Without Possibility of Parole Instruction Prevented the Jury from Considering Relevant Mitigating Evidence of Petitioner's Parole Ineligibility and that he Did Not Pose a Significant Future Danger to Society.

350. The failure to provide a life without possibility of parole instruction also violated the hallmark requirement of the Eighth Amendment that a capital sentencing jury must be permitted to consider and give effect to all relevant mitigating evidence. *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Sumner v. Schuman*, 483 U.S. 66 (1987); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Osborn v. Shillinger*, 861 F.2d 612, 628 n.16 (10th Cit. 1988) (referring to this doctrine as the clearest principle in modern death penalty jurisprudence").

351. A capital defendant's ineligibility for parole is itself a mitigating factor. *E.g.*, *State v. Henderson*, 109 N.M. 655, 666, 789 P.2d 603, 606-07, 614 (1990) ("Length of incarceration is a mitigating factor.") (Ransom, J., concurring in pertinent part); *Turner v. State*, 645 So.2d 444, 448 (Fla. 1994) (reversing death sentence where jury could have found ample mitigation, including that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole"). Moreover, "there is no question but that . . . inferences [that a life sentenced defendant would

not pose a future danger to society] would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (quoting *Lockett*, 438 U.S. at 604).

352. Therefore, "evidence that the defendant would not pose a danger if spared (but incarcerated) *must be considered potentially mitigating*.'" *Skipper*, 476 U.S. at 4. The parole ineligibility of a life-sentenced defendant "is indisputably relevant" to whether he will pose a future danger to society. *Simmons*, 512 U.S. at 163-64. "Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." *Id.* The failure to inform the jury of Petitioner's ineligibility for parole therefore prevented the jury from considering relevant mitigating evidence concerning Petitioner's parole ineligibility and future nondangerousness in violation of the Eighth Amendment."[30]

[30] The Supreme Courts of several states have vacated death sentences on these grounds. *E.g.*, *Mickens v. Commonwealth*, 249 Va. 423, 424-25, 457 S.E.2d 9, 9-10 (1995) (petitioner contended that Virginia procedural rule barring evidence related to a defendant's parole eligibility prevented jury from considering mitigating evidence of petitioner's parole *ineligibility*; death sentence vacated in light of *Simmons*); *Turner v. State*, 573 So. 2d 657, 674 (Miss.1990) (failure to provide life without possibility of parole instruction unconstitutionally limited "jury's consideration of any relevant evidence that could 'cause it to decline to impose the death sentence" (quoting *McClesky v. Kemp*, 481 U.S. 279, 304 (1987))).

D. The Failure to Provide a Life Without Possibility of Parole Instruction Prevented the Jury from Considering and Giving Full Effect to Other Relevant Mitigating Evidence That Was Present in this Case.

353. How jurors consider particular aggravating and mitigating evidence, and the weight they accord potentially mitigating evidence, is affected by their beliefs concerning a defendant's parole eligibility. *E.g.*, *Mackbee v. State*, 575 So. 2d 16, 41 (Miss. 1990) ("[t]he evidence from capital cases is strong that the possibility of the capital defendant's soon being back on the street is in the forefront of the typical juror's mind while balancing the factors involved in deciding whether a defendant should die"); *see also Deathly Errors*, *supra*, 18 COL. HUM. RTS. L. REV. at 256. As a result, the failure to provide a life without possibility of parole instruction prevented the jury from considering and giving full effect to *other* relevant mitigating evidence that was present in this case, separate and apart from the mitigating evidence that Petitioner would not pose a future danger to society because of his ineligibility for parole.

354. For example, the jury's materially false belief that Petitioner might be parole-eligible skewed its determination as to whether Petitioner's recidivism could be attributed in part to a failure of the criminal justice system to provide him adequate rehabilitation during his prior incarceration and/or adequate support when during his parole from his prior convictions. Indeed, the failure of the "system," which could be considered mitigating by a jury that was aware of its sentencing options, may actually be seen as *aggravating* by jurors who believe the defendant will eventually be released from prison.

355. "Any barrier to [the consideration of mitigating evidence] must . . . fall." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990). By burdening the presentation of mitigating evidence and the consideration of other potentially mitigating evidence already present in the record, the failure to instruct the jury that, in Pennsylvania, "life imprisonment" means "life without possibility of parole" violated the Eighth Amendment.

E. The Imposition of a Death Sentence by a Jury That Had Been Deprived of the Material Sentencing Information That a Life Sentence Means Life Without Possibility of Parole Offended the Evolving Standards of Decency That Underlie the Eighth Amendment.

356. A sentencing process that offends "the evolving standards of decency that mark the progress of a maturing society," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)), violates the Eighth Amendment. Petitioner's death sentence, which was imposed by a jury that was not informed that "life imprisonment" means "life without possibility of parole" (and therefore by a jury that had been denied accurate and material information concerning its sentencing options), was a product of such a process.

357. The evolving standards of decency that give content to the Eighth Amendment are measured by objective indicia of community values, including legislative judgments, sentences imposed by juries, public opinion, and international practices and opinion. *See, e.g. Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782

(1982); *Coker v. Georgia*, 433 U.S. 584 (1977). The imposition of a death sentence by a jury that has been presented a materially false and harsher sentencing choice offends every one of these indicia of community values.

358. The Supreme Court has placed great weight upon legislative judgments as a primary indicator of community values. *Gregg v. Georgia*, 428 U.S. 153, 174-75 & n.19 (1976). The judgments of these legislative bodies overwhelmingly reject Pennsylvania's approach. *O'Dell v. Netherland*, 117 S. Ct. 1969, 1981 (1997) (Stevens, J., with Souter, Breyer & Ginsburg. JJ., dissenting) ("The prevailing rule in the States that provided a life-without-parole sentencing alternative required an instruction explaining that alternative to the jury.").

359. In fact, at the time of Petitioner's trial only two legislatures[31] provided capital sentencing juries the life without parole sentencing option but refused to inform those juries that a life sentence meant life without parole, and Pennsylvania was *the only jurisdiction in the country* to forbid providing such an instruction. In these circumstances, legislative judgments evidence a clear national consensus against withholding from a capital sentencing

[31] Those states were South Carolina and Virginia. *See* S.C. CODE ANN. §§ 16-3-20(A), 24-21-640 (1991 Supp.); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); VA. CODE § 18.2-10, -31; VA. CODE ANN. § 53.1-151(B); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S. Ct. 88 (1991); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988). The Pennsylvania legislature does not require the withholding of accurate information concerning parole. That is a court-made rule, initially designed to protect defendants against harsher punishment resulting from jury speculation about possible early release from prison – a rationale that is inapplicable when, as here, the defendant is statutorily ineligible for parole.

jury accurate information that the life-sentencing option is life without possibility of parole. *See Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) ("[t]he upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman"; consequently, legislative judgment "obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman"); *see also Enmund v. Florida*, 458 U.S. 782, 792 (1982) (where "only a small minority of jurisdictions – eight – allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed," legislative judgment "weighs on the side of rejecting capital punishment for the crime at issue"); *Beck v. Alabama*, 447 U.S. 625, 635 (1980) (consensus concerning death penalty procedures established where "Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law."); *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O'Connor, J., concurring) ("Where such a large majority of the state legislatures [32] have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist."); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (finding consensus where "no State in the Union permits the execution of the insane").

360. At the time of *Simmons*, 24 of 26 other comparable states that provided the jury an option between life without possibility of parole and death informed the

sentencing jury of the defendant's parole ineligibility, either by instructing the jury to choose between the sentencing alternatives of death and life without parole,[32] or by giving the jury the power to specify whether the defendant should or should not be eligible for parole.[33] *See Simmons*, 512 U.S. at 167 n.7. Since that time, New York and the federal government have added death sentences in which an alternative sentence is life without parole, and juries in both of these jurisdictions are also informed that the defendant is ineligible for parole.[34] This "nearly universal acceptance" that juries should be advised when

[32] ALA. CODE § 13A-5-46(e) (1982); ARK. CODE ANN. § 5-4-603(b) (Supp. 1993); Cal. Pen. Code §190.3 (West 1988); Conn. Gen. Stat. § 53a-46a(f) (West 1985); Del. Code. Ann. tit. 11, 4209(a) (1987); 1993 Fla. Sess. Law Serv. 93-406, S.B. 26-B, § 16; Fla. Stat. 775.0823(1) (effective 1/1/94), Fla. Stat. 921.142 (West 1992) & Standard Jury Instructions-Criminal Cases, 603 So.2d 1175, 1205 (Fla. 1992); La. Code Crim. Proc. Ann. art. 905.6 (West Supp. 1993); Mo. Ann. Stat. § 565.030.4 (Vernon Supp. 1993); N.H. Rev. Stat. Ann. § 630:5 (IV) (Supp. 1992); Wash Rev. Code Ann. § 10.95.030(1), 95.050 (West 1990). Case law in three other states requires that capital sentencing juries be informed whenever a life sentence means the defendant will be ineligible for parole. *See* Colo. Rev. Stat. § 16-11-103(1)(b) (Supp. 1993); Ill. Rev. Stat. ch. 38, ¶ 1005-8-1 (Smith-Hurd Supp. 1992); Miss. Code Ann. § 47-7-3(1)(a) (Supp. 1992). Two of the remaining life-without-parole jurisdictions – South Dakota and Wyoming – have not considered the question of whether jurors should be instructed concerning the unavailability of parole. *See* S.D. Codified Laws Ann. § 24-15-4 (1988); Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (Supp. 1992).

[33] GA. CODE § 17-10-31.1(a) (Sapp. 1993); Ind. Code § 35-50-2-9 (Supp. 1993); Md. Ann. Code art. 27. § 413(c)(3) (1987); Nev. Stat. 182; Nev. Rev. Stat. Ann. § 175.554(2)(c)(2), - (4) (1992); N.Y. Correct. Ch. 43, art. 22-B, Historical & statutory notes (McKinney 1995); Okla. Stat. Ann. tit. 21, 701.10(A) (West 1993); Or. Rev. Stat. § 163.105 (Supp. 1992); Tenn. Code Ann. § 39-13-204(a), -(f)(2) (Supp. 1993); Utah Code Ann. § 76-3-207(4) (Supp. 1993).

[34] N.Y. CRIM. PRO. LAW § 400.27 (McKinney 1996); 18 U.S.C. § 3593 (1996).

"life" means "life without parole," unquestionably "establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. 625, 636-37 (1980).

361. Thus, legislative judgments provide powerful evidence that Pennsylvania's practice of withholding material information concerning the "life without possibility of parole" sentencing option offends the evolving standards of decency that prevail in this Nation, and therefore violate the Eighth Amendment.

362. The sentencing practices employed in this case also offend every other indicia of community values that have been employed by this Court to assess the constitutionality of a penal sanction under the Eighth Amendment. Clearly, the practice can draw no support from juries, whose "cho[ic]e between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) ("[t]he jury . . . is a significant and reliable index of contemporary values").

363. The United States Supreme Court has made clear that, "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system – a link without with [sic] the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon*, 39I U.S. at 519 n.15 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). Pennsylvania's refusal to accurately inform jurors as to the nature of their sentencing options severs that vital link between contemporary

community values and the penal system, and inherently distorts the community's expression of its contemporary values. In so doing, it offends the Eighth Amendment.

364. Similarly, this practice draws no support from public opinion, or international law and practices, which have also informed the Supreme Court's judgment.

365. General public opinion surveys provide evidence that the public does not support Pennsylvania's capital sentencing scheme. Polling data presented to the United States Supreme Court in *Simmons* reveals that only 7.1% of eligible jurors believed that a person who was sentenced to life would actually spend his entire life in prison – and therefore that 92.9% of respondents were unaware of the jury's actual sentencing options. Petitioner's Brief, *Simmons v. South Carolina*, 1993 WL 657673 at *154a, Table 2. Yet, if they were faced with a decision between sentencing a defendant to life or death, 86.8% of the jurors polled said it would be important to them to know "how much time the person would have to spend in prison before they would have a chance to be released, if you sentenced them to life imprisonment." *Id.* at *155a (Table 3). *Cf. Woodson v. North Carolina*, 428 U.S. 280, 298 n.34 (1976) (public opinion surveys indicating that public does not support mandatory death penalty provides evidence that mandatory death sentences violate the Eighth Amendment).

366. Additionally, Pennsylvania practice is squarely at odds with the long-standing positions of the American Law Institute that capital sentencing juries should be informed "of the nature of the sentence of imprisonment that may be imposed, *including its implication with respect to possible release upon parole*, if the jury verdict is against the sentence of death." ALI MODEL PENAL CODE

§ 210.6 (Prop. Off. Draft 1962); *cf. Thompson v. Oklahoma*, 487 U.S. 815, 830 & nn. 32 & 33 (1987) (formal opposition of American Bar Association and American Law Institute to execution of juvenile offenders under the age of sixteen provided evidence that such executions violate the Eighth Amendment).[35]

367. Thus, public opinion demonstrates that Pennsylvania's practice of withholding from jurors material information concerning the "life without possibility of parole" sentencing option, and imposing sentences of death by a jury that is presented a materially false choice as to its sentencing options offends the evolving standards of decency that underlie the Eighth Amendment.

368. Finally, Pennsylvania's death-penalty practices can draw no support from international law and practices. *E.g.*, *Thompson*, 487 U.S. at 830-31 & nn.31, 34 (international opinion and practices opposing execution of juveniles, expressed in statutes and treaties of Anglo-American and Western European nations, provided evidence that death penalty for juvenile offender aged fifteen or younger violates the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1976) (United Nations study indicating

[35] It is also noteworthy that three prominent professional associations, the American Bar Association, the Pennsylvania Bar Association, and the Philadelphia Bar Association have all adopted resolutions calling for a moratorium on capital punishment. While not specifically referring to Pennsylvania's practice of failing to provide a life without parole instruction, the Pennsylvania Bar Association resolution expressed its "serious doubts about whether, under current law and practice, the death penalty can be imposed in the courts of this Commonwealth in a manner which is fair and impartial, and not arbitrary and discriminatory." Similarly, the Philadelphia Bar Association resolution called for "a moratorium on executions until such time as the fair and impartial administration of the death penalty can be ensured."

that only three of 60 nations surveyed retained death penalty for rape unaccompanied by killing provided evidence that death penalty for non-homicidal rape violated the Eighth Amendment). Although the death penalty is not *per se* violative of international law, the United States is now alone among the Western democracies in permitting the death penalty for domestic offenses. No Commonwealth-country, Anglo-American, Western, European, or developed democracy permits death sentences to be imposed for domestic offenses, and it is now a condition of membership in the European Economic Community that member states abolish the death penalty. Certainly none of these nations permits the imposition of death by a jury from which a material sentencing option has been withheld. Additionally, not one international or regional human rights treaty envisions that death sentences would be imposed by a jury that has based its judgment on a materially inaccurate and harsher view of its sentencing options.[36]

[36] 36 *E.g.*, Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948) [*hereinafter* Universal Declaration]; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXX), December 16, 1966, 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976 [*hereinafter* ICCPR]; Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951, Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324, *entered into force* Dec. 13, 1951, Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324, *entered into force* Feb. 27, 1970 [*hereinafter*] OAS Charter]; American Convention on Human Rights, Art. 4; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953; *as amended by* Protocol No. 3 *entered into force* Sept. 21, 1970, and Protocol No. 5, *entered into force* Dec. 21, 1971 [*hereinafter* European Convention];

(Continued on following page)

F. The Failure to Provide a Life Without Possibility of Parole Instruction Resulted in a Capital Sentencing Hearing in Front of a Jury Uncommonly Willing to Condemn Petitioner to Die, in Violation of His Rights to an Impartial Jury Under the Sixth Amendment.

369. The state and federal constitutional right to an impartial jury guarantees that a capital defendant not be sentenced before a jury "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

370. The trial court's failure to provide a life without possibility of parole instruction, especially after such information had been specifically requested by the jury, resulted in a sentencing hearing before a jury that: (1) erroneously believed that Petitioner could be released on parole, leading them to incorrectly assume that he would pose a danger to society in the future, adding additional weight to any aggravating evidence introduced by the Commonwealth, and making a death sentence more likely; (2) was prevented from considering and giving effect to relevant mitigating evidence that, by virtue of Petitioner's ineligibility for parole, he would not pose a future danger to society, making a life sentence less likely; (3) was prevented by the absence of a "life without parole "jury instruction from giving full weight to evidence present in the record that might have justified a sentence of life without possibility of parole (but which might not justify a

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African [Benjul] Charter on Human and People's Rights, *adopted* June 27, 1981, OAU Doc. CAR/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [*hereinafter* African Charter].

life sentence if parole were a possibility), making a death sentence more likely; and (4) was provided a materially false sentencing instruction that "would result in harsher penalty options," *Fontenot v. State*, 881 P.2d 69, 74 n.2 (Okla. 1994), and "unquestionably tip[ped] the scales in favor of a death sentence that a fully informed jury might not impose." *Brown v. Texas*, 118 S. Ct. 355, 356 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., respecting denial of certiorari).

371. These errors, independently and collectively, caused Petitioner to be sentenced by a jury that was "oriented impermissibly toward the death penalty even before it began its deliberations," *State v. Henderson*, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) (reversing death sentence when information concerning length of defendant's parole ineligibility withheld from jury), and therefore uncommonly willing to condemn him to die, in violation of the Sixth Amendment.

G. Conclusion.

372. The errors described above resulted in a death sentence that violated the Sixth, Eighth, and Fourteenth Amendments. To the extent that counsel failed to properly inform the jury about Petitioner's ineligibility for parole, to object to the errors, to request a life without parole instruction, and to raise the issues appropriately in the trial court and on appeal, they were ineffective.

IV. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (D)(8) AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED.

373. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

374. The death sentence in this case was based in part on a jury finding of aggravating circumstance 42 Pa.C.S. § 9711(d)(8) – "The offense was committed by means of torture." The jury instruction "defining" this aggravating circumstance was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments.

375. The Pennsylvania Supreme Court has repeatedly recognized and held that the bare language of the (d)(8) "torture" aggravating circumstance does not "channel the sentencer's discretion by clear and objective standards." *Commonwealth v. Nelson*, 514 Pa. 262, 523 A.2d 728, 737 (1987) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)); *accord Commonwealth v. Billa*,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD ROMPILLA, PETITIONER	CIVIL ACTION
v	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, PHILIP L. JOHNSON, Superintendent of the State Correctional Institution at Greene, And JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview, RESPONDENT:	No.: 99-737 JUDGE BUCKWALTER

COMMONWEALTH'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND CONSOLIDATED PRELIMINARY MEMORANDUM OF LAW

AND NOW, comes JAMES B. MARTIN, ESQUIRE, District Attorney of Lehigh County, by and through MICHAEL P. MCINTYRE, ESQUIRE, First Assistant District Attorney, and files this response to the petition of Ronald Rompilla for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 based upon the following:

1-7. Admitted.

8. Denied as a conclusion of law.

I. TRIAL COUNSEL WERE NOT INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO PRESENT MITIGATING EVIDENCE WHICH WAS NOT REVEALED TO THEM BY ROMPILLA OR HIS FAMILY AFTER REASONABLE EFFORTS BY COUNSEL TO OBTAIN SAME.

9. No response necessary.

10-12. These allegations are conclusion of law for which no response is necessary.

13-166. Admitted in part, denied in part. All of these allegations are the petitioner's versions of the facts as represented by the hearing and deposition testimony presented at the hearing held by the trial judge on the petitioner's State Post Conviction Relief Act Petition.

Initially, many of the assertions contained in Rompilla's present petition are just not true. Rompilla's references to the alleged testimony of his siblings, Barbara Harris, Randi Rompilla, and Nick Rompilla, Jr. at the PCRA hearing is greatly exaggerated and, in some cases, just plain false. In addition, their testimony concerning Rompilla's allegedly abusive childhood at the hands of his father, was seriously undermined by cross-examination, contradicted by the fact that none of this information was ever given to Rompilla's trial counsel as testified to by them, and contradicted by the information given by Rompilla to one of his three psychological experts, Dr. Paul Gross. It is interesting to point out that of the three family members called as witnesses at the PCRA hearing, only one of them, Nick, had testified at Rompilla's trial in the penalty phase. Three others, his brother Robert, Nick's wife, Darlene, and Rompilla's own son, who had testified

at the trial in the penalty phase, were not called as witnesses by Rompilla at his PCRA hearing.

The Commonwealth is not going to go over piece by piece each inaccurate, misleading and false assertion set forth by Rompilla in his petition, but will set forth some examples of this constant misstating of the facts.

Initially, it is crystal clear that Rompilla never mentioned a thing to either his two trial counsel (Maria Dantos, Esq. and Frederick Charles, Esq.) or their investigator (John Whispel, now deceased) concerning any facts on which they could reasonably conclude that he had had an abusive childhood. (See N.T., 3/29/96, p. 22, N.T. 3/28/96, p. 46). The same is true for the present allegations from Mr. Rompilla that both he and his mother were alcoholics, that he had some type of head injury, and that he had blackouts. In fact, the testimony of Rompilla's counsel was that he was, basically, uncooperative concerning penalty phase information stating to his counsel that, "Your conversations about the possibility of the death penalty bore me.[1]" His lack of cooperation reached such heights that his trial counsel felt compelled, immediately prior to the trial, to send him a fourteen-page letter which was marked as exhibit D-2 at the hearing of March 28, 1996, and which clearly documented his lack of cooperation.

It also has to be clear that the failure on the part of the defense team, two attorneys and one investigator, to obtain this information from either Rompilla or his family

[1] Rompilla's lack of cooperation continued right into the penalty phase when he informed trial counsel that he did not want any witnesses called during said phase. (N.T., Vol. VI, p.128).

members was not due to a lack of trying on their part. They spent hours and hours with Rompilla and his family in addition to having Rompilla examined and tested by three separate psychological experts. A letter from Rompilla's wife, Sandy Whitby, was marked as exhibit C-2 at the hearing of March 29, 1996, and stands as a written testimonial to the efforts of Rompilla's defense team to seek to obtain any records in support of mitigating factors in regard to Rompilla's mental health. This report was marked as exhibit no. D-1 at the hearing of March 28, 1996.

Of course, the trial court, in its opinion, makes it clear that it rejected the testimony of Rompilla's siblings as presented at the PCRA hearings on the specific issue of their alleged communication with Rompilla's trial counsel during the trial. This rejection of the testimony from Rompilla's family at the PCRA hearing is not surprising based on the contradictory testimony of Rompilla's trial counsel, as well as the undermining of this Rompilla family testimony on cross-examination. For example, on direct examination Barbara Harris testified that her mother was an alcoholic who drank alcohol constantly while pregnant with all the younger children, including Rompilla. One fact revealed on cross-examination was that one of such younger children, Nick, was born when Mrs. Harris was only one-year old. In addition, Rompilla himself was born when Mrs. Harris was only six-years old. Further cross-examination indicated that there was no way that a small child of such tender years would have any personal information concerning the use of alcohol by her mother at those times as testified to on direct examination. (N.T., 3/29/96, p. 211).

In another example, Rompilla's brother Nick testified on direct examination that their father used a cage as punishment for both himself and Rompilla. Cross-examination revealed that Nick had never seen Rompilla being placed in the cage by their father and was completely unaware of whether or not Rompilla had seen Nick being placed into the cage, which Nick testified happened on *one* occasion when Rompilla would have been either one or two years old. (N.T., 3/29/96, p. 193, 194). Finally, while Rompilla's petition is full of assertions concerning his beating at the hands of his abusive father, his brother Nick testified that he had basically seen his father slap Rompilla on about two occasions, indicating by "slap" that his father hit him with an open hand when Rompilla had done something wrong. (N.T., 3/29/96, p. 195, 196).

While the Commonwealth does not want to go into other examples concerning Rompilla's misstatement of the facts, suffice it to say that the Commonwealth respectfully requests Your Honorable Court to take the assertions set forth in Rompilla's petition with a "grain of salt" and to read the Notes of Testimony and, particularly, the cross-examination of the witnesses making the assertions before accepting same.

In the face of this background, Rompilla's present counsel have the temerity to challenge the performance of his trial counsel by arguing that said counsel should have obtained three separate records; namely, Rompilla's grade-school records, his hospital record from a local hospital when he was two years old, and a Department of Corrections

record[2] which shows the result of a psychological test conducted while Rompilla was in prison in 1976, twelve years before the murder in question. The Pennsylvania Courts found that these records were not entirely helpful to Rompilla and further found that his trial counsel had given the three experts whatever information they had requested. It must be remembered that at the time of the commission of the crime for which Rompilla has now been convicted and sentenced to death, he was a *forty* year old man, and had been incarcerated in the state penal system for the last fourteen years; that is, from age twenty-six, having been out of prison for approximately only one month prior to his arrest on the charges that resulted in his present conviction.

Rompilla's present claim of ineffective assistance of counsel was adequately answered by Rompilla's trial counsel, Attorney Fred Charles, at the PCRA hearing when counsel, over and over, explained why it would not have been reasonable for him to have looked for any of the three records in question in light of the information received from Rompilla and his family and, more importantly, in light of the fact that trial counsel hired three extremely reputable and experienced psychological experts to elicit both from Rompilla directly and from testing of Rompilla all necessary information which is obtained in capital cases for the very purpose of determining whether

[2] In fact, the Department of Corrections record also indicated an IQ of 93 which showed that Rompilla, in 1976, tested far above the parameter for mental retardation. There was also other information on the Department of Corrections records which was harmful to the defense. (N.T., 3/29/96, p. 103).

or not there are any mitigating factors. (N.T., 3/29/96, pp. 10-14, 16, 21-23, 24-29).

It must be remembered exactly what information was contained in the three separate records which now form the basis of Rompilla's bone of contention. Rompilla's grade-school records (when he was ten and eleven years of age) showed IQ scores, the Department of Corrections MMPI test of 1976 showed various psychological testing results, and the hospital record from when Rompilla was two years old show that he was hospitalized for a fever. While the defense attempts to make much of the results of these records through its present psychological experts, Dr. Crown and Dr. Armstrong, the import of these records was completely minimized by the testimony of Dr. Frank Dattilio, the Commonwealth's present psychological expert. In addition, it cannot be forgotten that both an IQ and an MMPI test, as well as other psychological testing, was done by Dr. Gerald Cooke, on behalf of Rompilla's trial counsel, following his examination of the defendant between the time of his commission of the crime and his trial.

In short, while Rompilla's present counsel argues for the importance of records which are respectively thirty, twelve, and thirty-eight years old, his trial counsel had the same tests taken in 1988. With respect to the alleged mitigation evidence brought forth by Rompilla's siblings at the PCRA hearing, the trial court and Pennsylvania Supreme Court were correct in resolving the issues raised by this evidence against Rompilla. The trial court, affirmed by the Pennsylvania Supreme Court, accepted as credible Rompilla's trial counsel's testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could

be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-119, 133, 143; N.T. 3/29/96 at 111.

The same is true for Rompilla's present claim of his alleged problems with alcohol. No evidence of this was ever furnished to trial counsel by either Rompilla or his siblings and, in fact, Rompilla had denied to one of the psychiatric experts, Paul Gross, that he had any alcohol problems.

Although not reached by the Pennsylvania Supreme Court, because it had decided that Rompilla had failed to satisfy the second "prong" of an ineffective assistance claim, the Commonwealth also alleges that Rompilla failed to satisfy the third or prejudice "prong" of such a claim by failing to show that he was prejudiced by his trial counsels' not having presented any of this mitigation evidence. The PCRA trial court had also found that Rompilla had failed to show prejudice. It is respectfully submitted that there was no way that Rompilla could show that any of this mitigation evidence would have changed either the opinion of the three experts obtained by trial counsel or the jury verdict. It must be remembered that the opinion of all three of these experts, after examining and testing Rompilla, was that there was nothing that they could offer in mitigation and that the test results which they have obtained would have hurt the defense. (N.T., 3/28/96, p. 122).

In order to show prejudice, a petitioner must show that, but for the act or omission in question, the outcome of the proceeding would have been different, *Commonwealth v. Douglas,* 537 Pa. 588, 645 A.2d 226 (1994); *Commonwealth v. Fahy,* 537 Pa. 533, 645 A.2d 199 (1994); *Commonwealth v. Buehl,* 540 Pa. 493, 658 A.2d 771 (1995);

and also *Commonwealth v. Travaglia,* 541 Pa. 108, 661 A.2d 352 (1995), *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313 (1997). *United States v. Day,* 969 F.2d 39 (1992) makes it clear that Rompilla had the burden of proving prejudice to a reasonable probability that the outcome of the jury verdict would have been different had the mitigation evidence been presented.

In this case, the general weight of the psychological evidence, even if it had included the records which were not obtained, was detrimental to Rompilla since he clearly tested as a sociopath and, as such, would have been seen as a danger to society, all but inviting the jury to request the death penalty. Rompilla's attempts, many years after the trial, to claim that more information should have been provided to the experts hired to examine and test Rompilla cannot carry his burden of showing that, but for the failure to obtain these records, or present this testimony, the outcome of the proceedings would have been different. In fact, the Commonwealth believes that it was actually good strategy not to present the type of mitigation evidence which Rompilla now claims should have been presented since said evidence was contradictory to Rompilla's continued position that the jury had convicted an innocent man. The presentation of evidence which, basically, represented an explanation of why Rompilla had grown into a cold blooded murderer was completely inconsistent with his position that he was innocent and would have only reinforced the jury's certainty in their verdict.

167-171. Denied as incorrect conclusions of law. On the contrary, both the trial court and the Pennsylvania Supreme Court found that there are three, not two, "prongs" that the petitioner must satisfy in order to show ineffective assistance of counsel. They are: 1) the underlying claim is

of arguable merit; 2) counsel had no reasonable basis for the act or omission in question; and 3) but for counsel's act or omission, the outcome of the proceeding would have been different. *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313 (1997). The Commonwealth respectfully submits that this is the same standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984) and *United States v. Day,* 969 F.2d 39 (1992).

The trial court and the Pennsylvania Supreme Court found that Rompilla failed to prove that his trial counsel did not have a reasonable basis for not offering mitigation evidence. The Pennsylvania Courts have found that trial counsel, in fact, acted reasonably in employing two recognized experts in the field of psychiatry and psychology who administered tests, evaluated Rompilla and reported that there was nothing that could be used as mitigation evidence. Rather, both experts told Rompilla's trial counsel that he was a sociopath. Amazingly, Rompilla's trial counsel did not stop with the first two experts, but obtained an evaluation by a third expert, a psychiatrist, Dr. Paul Gross, who, after evaluating Rompilla, found nothing that would be beneficial in the penalty phase.

172-200. The Commonwealth incorporates its answers with paragraphs 13 through 166.

201-204. These allegations are conclusions of law to which no response is necessary.

205-219. The Commonwealth incorporates its answers to paragraphs 13 through 166.

220-222. These allegations are conclusions of law to which no response is necessary.

223-249. The Commonwealth incorporates its answers to paragraphs 13 through 166.

250-252. These allegations are conclusions of law to which no response is necessary.

II. THE TRIAL COURT'S REMARKS TO THE JURY ON ACCOMPLICE LIABILITY WERE NOT TANTAMOUNT TO AN INSTRUCTION ON SAME AND WERE COMPLETELY HARMLESS.

253. No response necessary.

254. Admitted in part. The last sentence is a conclusion of law to which no response is necessary.

255. It is denied that there was any forensic evidence at all that suggested someone other than Rompilla committed the murder in question. None of the examples presented by Rompilla support its erroneous conclusion.

The cases cited by Rompilla in his petition completely miss the point and are irrelevant because an accomplice theory of guilt was not given to the jury by the trial judge.

III. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE WAS NOT ERROR UNDER CASE LAW EXISTING AT THE TIME OF ROMPILLA'S TRIAL SINCE THE COMMONWEALTH DID NOT MAKE ROMPILLA'S FUTURE DANGEROUSNESS AN ISSUE.

284. No response necessary.

285. This allegation is a conclusion of law to which no response is necessary, although the Commonwealth

agrees that the cases cited do stand for the proposition cited and that the case law is as set forth by Rompilla and as developed in the years *after* his trial.

286-322. Admitted in part, denied in part. It is admitted that during jury deliberations in the penalty phase the jury asked the question: "If a life sentence is imposed, is there any possibility of the defendant ever being paroled?" It is also admitted that the trial court responded to that question in the following way:

> "I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?"

All of the other factual material, implications, and conclusions, including the quotes from various publications, are denied.

323-372. These are conclusions of law to which no response is necessary. The Commonwealth respectfully submits that this issue was handled correctly by the trial court and the Pennsylvania Supreme Court. Rompilla's argument that the jury should have been told that a life sentence means life without parole under *Simmons v. South Carolina,* 512 U.S. 154 (1994) must fail because *Simmons* was not the law at the time of Rompilla's trial and, even if it were the trial court instructions still would not be erroneous because Rompilla's future dangerousness was not at issue see *Commonwealth v. Clark,* 551 Pa. 258,

710 A.2d 31, 35-36 (1998). Under the state of the law in Pennsylvania at the time of the Supreme Court's decision, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark, supra.* Rompilla's argument that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he had a significant history of felony convictions involving the use or threat of force also fails because the Pennsylvania Supreme Court rejected this argument in *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44, 47 (1998). Clearly, the aggravating circumstance argued by the Commonwealth only addressed Rompilla's past conduct not his future dangerousness.

Aside from the fact that *Simmons* was not decided until 1994, the holding in *Simmons* clearly does not govern the *facts* of this particular case. In *Simmons,* the prosecution in its closing argument argued that the defendant's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. The prosecutor urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." There was no such argument in Rompilla's trial. The prosecution merely argued that Rompilla had a significant history of felony convictions which was proper argument as an aggravating factor under Pennsylvania law.

Rompilla argues that the jury did not abide by the trial court's instruction that it must not consider the possibility of parole in its deliberations. Rompilla points to the fact that, subsequently, the jury requested exhibits that were docket entries relating to Rompilla's prior conviction for burglary and rape. Such a request is not

evidence that the jury did not abide by the trial court's instruction since the exhibits requested would shed no light on whether or not a defendant sentenced to life imprisonment would ever have the possibility of being paroled. Also, it must be presumed that the jury followed the trial court's instructions. *Commonwealth v. Travaglia,* 541 Pa. 108, 661 A.2d 352 (1995); *Commonwealth v. Stoltzfus,* 462 Pa. 43; 337 A.2d 873 (1975).

While Rompilla argues strenuously that his future dangerousness was at issue in a general sense, the issue is whether or not the prosecutor made any comment concerning his future dangerousness as did the prosecutor in *Simmons.* It is respectfully submitted that the holding in *Simmons,* even if applicable to this case decided in 1988, is limited to the facts of that case; namely, cases in which the prosecutor urged a verdict of death on the basis of the future dangerousness of the defendant.

Finally Rompilla's arguments concerning what inferences can be drawn from subsequent questions by the jury in regard to the length of Rompilla's sentence and the extent of his rehabilitation on his prior convictions was not an expression of its concern over his possible future dangerousness. These questions from the jury relate more to the issues raised by the defense witnesses during the penalty phase, who had complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole after his 1974 rape and burglary convictions. In fact, that apparent concern of the jury resulted in the finding by the jury of a mitigating factor to the effect that "the possibility of no rehabilitation during incarceration and after release". (N.T., 11/3/88, p. 21). In short, it is clear that the jury's question and finding of this mitigating circumstance was directly related, not to any thoughts of

the defendant's future dangerousness, but to the testimony of the defense witnesses in the penalty phase.

IV. THE OBTAINING OF THE (D)(8) AGGRAVATING CIRCUMSTANCE WAS NOT UNCONSTITUTIONAL.

373. No response necessary.

374. Admitted that the aggravating circumstance that the offense was committed by means of torture was one of the three aggravating factors found by the jury.

* * *